IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA420/2018
[2020] NZCA 98

BETWEEN	ATTORNEY-GENERAL Appellant
AND	STRATHBOSS KIWIFRUIT LIMITED First Respondent
	SEEKA LIMITED Second Respondent

Hearing:	11–14 and 18–21 March 2019
Court:	Kós P, Brown and Courtney JJ
Counsel:	J E Hodder QC, P H Higbee and N Fong for Appellant A R Galbraith QC, D M Salmon, M Heard and J P Cundy for Respondents
Judgment:	9 April 2020 at 1 pm

JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **The cross-appeals are dismissed.**

C **The respondents must pay the appellant costs for a complex appeal on a band B basis together with usual disbursements. We certify for second counsel.**

D **Costs in the High Court are to be determined by that Court.**

Table of Contents

REASONS OF THE COURT

[1] Is the Crown liable to kiwifruit growers and post-harvest operators in negligence for granting an import permit in 2007 for a consignment of kiwifruit pollen from China and renewing that permit in 2009, or for not inspecting those goods when they arrived in New Zealand?[1] That consignment of pollen is said to have introduced the Psa3 bacteria, a virulent strain of a plant disease that destroys kiwifruit plants — in particular, gold kiwifruit. From 2010 Psa3 swept through kiwifruit orchards in the Bay of Plenty region. The disease could not be eradicated. Vines were torn out. It took several years for the industry to re-establish itself.

[2] Strathboss, the first respondent, is a grower plaintiff representing approximately 200 growers. Strathboss' own loss is said to be approximately $9.5 million. The group loss may be as much as $450 million. Seeka, the second respondent, is a PHO that packs and cools kiwifruit. Its losses are said to be $92.6 million.

[3] Proceedings were commenced in 2014. A nine week trial ensued in the High Court in the second half of 2017. In June 2018 Mallon J issued a judgment of some 496 pages.[2] In it she held the Crown liable to Strathboss, the representative grower, in relation to the grant of the import permit. She cleared the Crown of liability

---

1 We refer to post-harvest operators as PHOs hereafter.
2 *Strathboss Kiwifruit Ltd v Attorney-General* [2018] NZHC 1559 [High Court judgment].

for failure to inspect the pollen, and of liability to Seeka, the PHO. Quantum was left for assessment at another trial.

[4] The Crown appeals the permit liability finding. Strathboss cross-appeals in relation to the failure to inspect conclusion. Seeka cross-appeals in relation to the dismissal of its claim.

[5] Before moving to discuss matters of general application and the grounds of appeal and cross-appeal we summarise the conclusions reached in the course of the judgment.

SUMMARY OF JUDGMENT

[6] In this judgment we allow the Crown's appeal, finding that it has a statutory immunity precluding liability for the alleged negligent acts or omissions:

(a) First, we conclude that the Crown cannot be directly liable in tort by reason of the Crown Proceedings Act 1950. Its liability, if any, must be vicarious. That means the respondents must first identify direct liability on the part of individual Crown servants or agents before the Crown can be vicariously liable in tort.

(b) Secondly, we conclude that s 163 of the Biosecurity Act 1993 provides an immunity in respect of the acts or omissions of the relevant personnel. That is, the individuals said to have been in breach of a duty of care to the respondents have an immunity against civil and criminal liability. The Crown takes the benefit of this immunity pursuant to s 6(1) of the Crown Proceedings Act. Inasmuch as no cause of action can lie against the individual personnel responsible, nor can one lie against the Crown.

[7] In case this proceeding should be considered further in another jurisdiction, we go on to analyse duty and breach as if the immunity issue had been answered in favour of the respondents:

(a) In relation to the first cause of action, the granting of the import permits, we would have found that no duty of care is owed. Although there is sufficient proximity, policy factors, in particular the risk of indeterminate liability, mean it would not be fair, just and reasonable to impose a duty of care in these circumstances.

(b) Had a duty of care been owed, we would have found that the relevant personnel acted in breach of the alleged duty by granting the import permits without undertaking an effective risk assessment.

(c) In relation to the second cause of action, the failure to inspect at the border, for essentially the same reasons as the first cause of action we would have found no duty of care to exist. While there was sufficient proximity for a duty of care to exist, policy factors, in particular indeterminacy, mean it would not be fair, just and reasonable to impose a duty of care in the circumstances.

(d) Had a duty of care been owed, we would have found that the failure to inspect the June 2009 consignment of kiwifruit pollen fell below the standard of care expected of skilled and informed personnel in the circumstances. However, that failure had no causative effect because the permit made provision for unmilled pollen.

(e) We would have agreed with the Judge's overall finding that the June 2009 consignment was, more likely than not, the source of the Psa3 incursion.

[8] We do not indicate what our findings would have been in respect of the respondents' cross-appeals on duty of care (that is, whether the High Court erred in limiting the duty of care to those who have "property rights" in the vines, and whether the High Court erred in finding that the relevant personnel did not owe a duty of care in relation to Seeka in its capacity as a PHO). These matters were not fully advanced in argument before the High Court Judge, or before us. It is unnecessary for us to analyse what is, in all the circumstances, a hyper-hypothetical liability.

GENERAL MATTERS

Background

[9] In this section of the judgment we set out background evidence in relation to the kiwifruit industry, the Psa disease, events prior to the relevant import permit applications, the permit applications themselves, importation of the pollen, the application of the pollen in the Te Puke area, and the Psa3 outbreak in New Zealand.

[10] We do so comparatively briefly. More detailed analysis of the facts, where needed, will be found later in this judgment.

The kiwifruit industry

[11] No challenge was made by the Crown to the Judge's summary of the industry at [43]–[52] of her judgment. We draw upon that summary.

[12] New Zealand is the third largest kiwifruit producer in the world after China and Italy. It has been a significant industry here for around 40 years. The kiwifruit that China produces is largely consumed by its domestic market. Italian production is focused on Europe. New Zealand production focuses on the export of premium fruit. About 72 per cent of production is green kiwifruit; about 22 per cent is the more lucrative gold variety. In 2015 kiwifruit was New Zealand's second largest horticultural export after wine, earning export receipts of $1.2 billion.[3]

[13] There are around 2,500 growers in New Zealand, and around 3,200 registered orchards. The industry is highly land-intensive. While predominantly based in the Bay of Plenty around Te Puke, the industry stretches from the far north of the North Island to the Marlborough/Tasman region in the north of the South Island. The average size of an orchard is a little under four hectares. Some are small lifestyle blocks; others are larger commercial operations. Some are owner-operated; others are operated under lease.

---

[3] Export receipts in 2009 were approximately $1.072 billion.

[14] New Zealand has a "single desk" export arrangement for kiwifruit through Zespri International Ltd, a company owned by growers. It has an almost complete monopoly on the marketing of New Zealand kiwifruit outside of New Zealand and Australia. It accounts for 30 per cent of global kiwifruit sales. It is regulated by Kiwifruit New Zealand, established under the Kiwifruit Export Regulations 1999.

[15] PHOs such as Seeka contract with suppliers.[4] They provide kiwifruit grading, packing and cool store services before the fruit is sent to the docks for shipment to overseas markets by Zespri. Some PHOs arrange for the picking of fruit on orchards and for the transport of the fruit to the pack house. They may also provide other orchard management services to growers. Some PHOs lease orchards. Three year leases are the most common. The PHO sector is highly competitive. And concentrated: six major PHOs account for about 85 per cent of the sector. Most PHOs are grower-owned. Seeka, a publicly listed company, is not.

Biosecurity in New Zealand

[16] New Zealand and Australia have long contended for rather stricter biosecurity arrangements in the context of world trade than many other countries. That reflects our unusual status as island nations. New Zealand is highly remote. But it is still prone to wind or sea-borne pest incursions. It is also more reliant on primary production than any other developed country. New Zealand's biosecurity status is central to its future economic performance. For example, in 2003 a report prepared by the Reserve Bank of New Zealand and the Treasury estimated that an adverse change in New Zealand's foot and mouth disease status would cost the economy approximately $10 billion two years after an outbreak.[5] The dependence of the New Zealand economy on the export of primary production means keeping unwanted pests and diseases out of New Zealand is of paramount importance.

[17] But, as a former Director-General of the Ministry of Agriculture and Fisheries (MAF) said in evidence, biosecurity is a complex field of endeavour.[6] It is inherently

---

4 Suppliers are registered combinations of growers. Suppliers enter supply agreements with Zespri.

5 Aron Gereben, Ian Woolford and Melleny Black *The macroeconomic impacts of a foot-and-mouth disease outbreak: an information paper for Department of the Prime Minister and Cabinet* (Reserve Bank of New Zealand and Treasury, 14 February 2003) at 1.

6 As to MAF see below at [19].

a risk management exercise. New Zealand cannot run a hermetically sealed border. Those charged by statute with biosecurity can only manage risk. They cannot eliminate it. One of the questions in this appeal is the extent to which the common law requires officials with statutory powers to reduce risk.

[18] As the former Director-General also stated, the resources required to eliminate biosecurity risk, and the impact that would have on the flow of goods across the border, would be immense, and perhaps counterproductive. Trade volumes had nearly doubled since 2003. As the former Director-General put it, "[f]or a nation dependent on trade, like New Zealand, it would place an impossible burden on the border." However, as we will see, there are international obligations which bear on the extent to which biosecurity risk management may be pursued.

[19] The Department of Agriculture was formed in 1892. It has since been the subject of substantial reorganisation. In 1972 parts of the Marine Department were amalgamated with the Department of Agriculture, to form the Ministry of Agriculture and Fisheries, or MAF. In 1992 parts of MAF were shifted to new Crown Research Institutes — AgResearch, the National Institute of Water and Atmospheric Research (NIWA) and Plant & Food Research. MAF, along with other border agencies, is a member of the Crown's Border Sector Governance Group. At the relevant time MAF was tasked particularly with whole-of-government leadership of New Zealand's biosecurity systems. The Government's overarching biosecurity objective was to keep potentially harmful organisms from entering and/or establishing in the New Zealand environment. At the relevant time, border quarantine functions were performed by a business section of MAF, called "MAF QUAL" (Quality Management).

[20] Within MAF, there were a number of teams responsible for the importation of plants. In particular, the Risk Analysis Group (RAG) and the Plant Imports Team worked closely together. RAG identified the hazards (pests and diseases) associated with a particular commodity or pathway; the likelihood of the hazard entering, establishing or spreading in New Zealand; and the likely impact the hazard might have on plants, environment, economy and human health. The Plants Risk Analysis Team carried out this analysis in the context of pests and diseases associated with plants. The Plant Imports Team undertook identification and evaluation of the risk

management aspect — imposing measures to mitigate the risk of pest and diseases identified by RAG. They would review the risk analysis done by RAG, then consider risk management measures that could be put in place to reduce the risk to an acceptable level to New Zealand.

[21] On 1 October 1993 the Biosecurity Act came into force.[7] It was an attempt by Parliament to bring all biosecurity legislation together in one place. The previous regime was a piecemeal one. The Act is discussed in more detail later in this judgment.[8]

[22] In 1995 New Zealand became party to the World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures.[9] It is also known as the SPS Agreement. Article 2.2 of that Agreement provides that members are to ensure that "any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence". There is an exception for provisional measures where relevant scientific evidence is considered insufficient.[10]

[23] In 1997 the Act was amended to give greater emphasis to the concept of the import health standard, or IHS.[11] IHSs govern the importation of "risk goods". We discuss this in more detail a little later in this judgment.[12]

The Psa disease

[24] Psa is scientific shorthand for the bacterium *Pseudomonas syringae* pv. *actinidiae*. The word *actinidiae* refers to *Actinidia*, the kiwifruit genus.[13] There are a number of different strains of Psa (although this fact was not known until at least 2010). One strain (now known as Psa1) was identified as having affected Japan in the

---

7 We refer to the Biosecurity Act 1993 as the Act hereafter.

8 See below at [49]–[67].

9 Agreement on the Application of Sanitary and Phytosanitary Measures 1867 UNTS 493 (opened for signature 15 April 1994, entered into force 1 January 1995) [SPS Agreement].

10 Article 5.7.

11 The rationale for the amendment is discussed below at [157].

12 See below at [53]–[66] and [156]–[158].

13 There are several species of kiwifruit including, relevant to this appeal, *Actinidia deliciosa* (green kiwifruit), *Actinidia chinensis* (gold kiwifruit) and *Actinidia arguta*.

late 1980s and in Italy in 1992. A second strain, now known as Psa2, was identified as having affected Korea in 1997.

[25] Psa3 is the strain that devastated the New Zealand kiwifruit industry. Psa3 was identified as having affected Italy in 2008. It has since been found in New Zealand, Chile, China, Japan and Korea.

[26] Psa3 may be further divided into pandemic and divergent groups. Psa3 in New Zealand, Europe and Chile is of the pandemic variety, and is virulent. It causes a browning and wilting of buds and flowers, the collapse of fruit and the ultimate death of plants, as the plant responds to kill affected cells to contain the infection.

[27] In 1999 MAF had recognised that Psa was a pest of potential concern. At that stage it had little information as to the geographical distribution of Psa, bar it having been recorded in Japan and Italy. The long-distance transmission of the Psa bacterium was noted as occurring through infected plant material — but "less likely on fresh fruit and unlikely on seed". Pollen was not specifically addressed at that stage.

[28] A pest data sheet prepared in August 2003 was somewhat more detailed, again noting the presence of Psa in Japan and Italy (and its absence from New Zealand). As to transmission, it noted that Psa "is present in infected plant material and, therefore, is usually introduced into new regions in nursery material". The transmission by orchard equipment, such as pruning implements, was also noted. The document further recorded that Psa "has the potential to cause severe damage to developed kiwifruit plants and to reduce yields".

[29] Importation of pollen into New Zealand was unusual. A senior member of MAF's Plant Imports Team could recall only two or three such import permit applications. These permits were for breeding rather than direct pollination in the field. The approach MAF took to pollen imports until 2007 included a condition that the pollen be used to pollinate a mother plant in a contained environment (such as a post-entry quarantine, or PEQ, facility) and then either the seed or tissue of the plant be tested after a period of observation. For example, permits were granted for gentian and clivia pollen in 2004/2005 on the basis they be used in a PEQ facility and isolated

for three months. A longer six month PEQ isolation period was required for a proposed import of kiwifruit pollen (for artificial pollination) by the Horticulture and Food Research Institute of New Zealand, HortResearch, in late 2005. The longer PEQ period for kiwifruit pollen compared to gentian and clivia pollen reflected the fact that kiwifruit plants are an important horticultural crop with known pests and diseases of concern rather than being an ornamental plant (such as gentian).

[30] In May 2004 a schedule for *Actinidia* in the relevant IHS, IHS 155.02.06 (Nursery Stock),[14] was amended after a process of review and consultation. Both Zespri and HortResearch had made submissions. The schedule set out requirements for entry conditions for kiwifruit cuttings and tissue culture, including documentary requirements for a phytosanitary certificate and a requirement that such nursery stock be imported into PEQ at a level three facility for a minimum period of six months.[15] There was no provision made for kiwifruit nursery stock of any other kind in the schedule.

[31] In July 2006 MAF initiated a review of scientific literature on plant pests and diseases associated with pollen. The review was intended to assist decision-makers in assessing the risks of importing new germplasm in the form of pollen. The review was undertaken by members of MAF's Plant and Health Environment Laboratory, or PHEL. It is known as the "PHEL Review". In its final form, the review stated that "there are no known bacteria, mollicutes or invertebrates that use pollen as a form of transmission". Specifically, in relation to kiwifruit, it stated:

> There are no recorded pests or pathogens that are pollen transmitted in *Actinidia* species.

Kiwi Pollen's permit applications

[32] On 23 November 2006 a small company based in the Te Puke area, Kiwi Pollen Ltd, contacted MAF's Plant Imports Team enquiring about importing frozen kiwifruit pollen from Italy and China. The Plant Imports Team sought advice

---

14 Kiwifruit plant material and fruit were covered by two other IHSs: IHS 155.02 (Importation and Clearance of Fresh Fruit and Vegetables into New Zealand); and IHS 155.02.05 (Seed for Sowing). However, IHS 155.02.06 (Nursery Stock), referred to hereafter as the Nursery Stock IHS, matters most for present purposes.

15 See below at [59].

from the team manager at PHEL, who provided a link to the PHEL Review referred to at [31] above. He noted, in an email, "[a]s you will see there are no pests or diseases known to be associated with pollen of Actinidia spp." That advice has been the subject of sustained criticism by the respondents and expert witnesses called by them.

[33] In due course the Plant Imports Team advised Kiwi Pollen that its application would be granted on the condition that hand-collected, unopened male flower buds of kiwifruit could be imported. MAF would require consignments to be accompanied by a government-issued phytosanitary certificate that the male flower buds were hand collected and unopened. These conditions would mitigate the risk of contamination from insects or weather. The respondents' case was that this created a direct pathway for pests between pollen and orchard.

[34] A permit to import would also be required. However, unlike the earlier proposed import of kiwifruit pollen by HortResearch, there was no reference on this occasion to a requirement the pollen be germinated in a PEQ environment.[16]

[35] An application to import was submitted by Kiwi Pollen in March 2007. It identified a particular exporter from "China or Japan" (being Bexley Inc), a country of origin (being China), and the purpose of importation (being "commercial kiwifruit pollination"). The part of the form providing for details of goods required to go to a transitional (quarantine) facility was left blank.

[36] On 16 April 2007 a permit to import nursery stock was issued to Kiwi Pollen in essentially those terms. Like prior permits for pollen, the permit form stated:

> Standard
>
> 155.02.06, Importation of Nursery Stock

However, unlike the permits earlier referred to,[17] there was no special condition providing for any form of PEQ.

---

16 See above at [29].
17 See above at [29].

[37] In November 2008 an import permit was issued to Kiwi Pollen to import kiwifruit pollen from Chile. Kiwi Pollen received two shipments of kiwifruit pollen from that country. It is unclear from the evidence what use was made of this pollen.

[38] In April 2009 the Nursery Stock IHS was amended. There were however no material changes to the *Actinidia* section.

[39] On 29 April 2009 Kiwi Pollen applied for a further permit to import kiwifruit pollen from China. This was stated to be a "Renewal" of an existing permit. The same exporter and country of origin as in 2007 were stated. The purpose of importation was stated to be "pollination of kiwifruit". Again, the part of the form relating to use of a transitional facility was left blank.

[40] The following day a permit to import frozen kiwifruit pollen was issued in essentially the same form as the 2007 permit.

Importation of the pollen

[41] In accordance with the 2009 import permit, Kiwi Pollen imported two shipments of pollen from China. The first arrived in New Zealand on 24 June 2009.[18]

[42] The Judge found that the Nursery Stock IHS required inspection of the June 2009 consignment but that was unlikely to have happened. Moreover, there were discrepancies between the phytosanitary certificate and the 2009 permit that should have led to the issuing of a non-compliance report, or NCR, which did not occur. The June 2009 consignment should have been put on hold pending further advice from the Plant Imports Team. That did not occur and instead the June 2009 consignment was cleared and delivered to Kiwi Pollen in Te Puke soon after 30 June 2009.

[43] The managing director of Kiwi Pollen gave evidence that when the package was opened she found anthers (or "rough pollen") rather than the fine powdery pollen she expected to have been sent. She placed the June 2009 consignment in a freezer. At a later point she processed the frozen anthers using a cyclone machine in the pollen

---

[18] We refer to this shipment as the June 2009 consignment hereafter.

room at Kiwi Pollen's premises. The resulting pollen was quite small in volume — possibly one to two cms at the bottom of a 250 g jar. Although she gave evidence that the pollen was low quality, and that she had probably thrown it out, the Judge reached a different conclusion. She concluded that it was highly likely that the pollen from the June 2009 consignment was kept by Kiwi Pollen.[19]

The Psa3 outbreak in New Zealand

[44] In October 2010 leaf speckling became apparent on the vine leaves at two orchards, Olympos and Kairanga. One of the shareholders of Kiwi Pollen owned and managed Kairanga, which was located across the road from Olympos. Both orchards grew the Hort16A gold kiwifruit variety. On 28 October 2010, Olympos' manager took some of the leaves to HortResearch in Te Puke. They were sent on to Plant & Food Research for testing. On 5 November 2010 the presence of Psa3 bacteria in the leaves of Olympos orchard was confirmed. Three days later the same bacteria was confirmed present at Kairanga orchard.

[45] MAF imposed biosecurity restrictions on orchards believed to be or suspected to be harbouring the Psa3 bacteria. An intense hygiene regime was also imposed. People entering the orchards were required to wear protective disposable clothing, and wash down on departure. An "aggressive management" programme was developed to eradicate or contain the disease.

[46] Vine-cutting began in January 2011. Fruit was mulched, and vines were cut down, leaving only stumps. Within a month it was apparent the disease could not be contained. By August it had spread into the wider Bay of Plenty region, and later in that year into Northland, many hundreds of kilometres away.

[47] A compensation scheme was developed with government, the details of which were set out in the High Court judgment.[20] Over $17 million was paid to growers who had cut out vines. Once it became apparent the disease could not be contained,

---

19 High Court judgment, above n 2, at [1058]. The evidence suggested that the waste from the cyclone machine was probably disposed of as industrial compost.

20 At [114]–[126].

compensation payments were discontinued. The Judge describes in some detail the stress this outbreak caused individual growers.[21]

[48] The Judge found that Kairanga and Olympos were the epicentre of the outbreak. But she could not identify the means by which the bacteria had reached the orchards.[22]

Biosecurity and its statutory framework

[49] We will not repeat the summary at [16]–[20] above. Nor do we need to repeat the Judge's helpful summary of the importance to New Zealand of biosecurity, its funding, and the structure of MAF at the relevant time.[23] These aspects of her judgment are not contested here. The Judge summarised the statutory framework for biosecurity at [163]–[186] of her judgment. We draw upon that summary here.[24]

[50] As the Judge noted, the Act is the statute under which MAF granted Kiwi Pollen permits to import pollen, cleared the June 2009 consignment of pollen at the border and responded to the Psa3 outbreak.[25] The title to the Act provides that it is:

> An Act to restate and reform the law relating to the exclusion, eradication, and effective management of pests and unwanted organisms

[51] The Act binds the Crown.[26] The responsible Minister has responsibility for providing for the co-ordinated implementation of the Act, recording and co-ordinating reports of suspected new organisms, and managing appropriate responses to such reports.[27]

[52] Part 3 of the Act provides for "the effective management of risks associated with the importation of risk goods".[28] "Risk goods" are defined:[29]

---

21 At [134]–[142].
22 At [1029] and [1114].
23 At [148]–[153] and [187]–[198].
24 We refer throughout to versions of the legislation current at the relevant times.
25 High Court judgment, above n 2, at [163].
26 Biosecurity Act, s 5 (except as provided for in s 87, which is not relevant here).
27 Section 8(1).
28 Section 16.
29 Section 2.

> **Risk goods** means any organism, organic material, or other thing, or substance, that (by reason of its nature, origin, or other relevant factors) it is reasonable to suspect constitutes, harbours, or contains an organism that may—
>
> (a) Cause unwanted harm to natural and physical resources or human health in New Zealand; or
>
> (b) Interfere with the diagnosis, management, or treatment, in New Zealand, of pests or unwanted organisms:

[53] Part 3 then sets out the process for importing risk goods. Section 22(1) of the Act requires that IHSs must specify requirements to be met "for the effective management of risks associated with the importation of risk goods before those goods may be imported, moved from a biosecurity control area or a transitional facility, or given a biosecurity clearance". This includes goods "the importation of which involves, or might involve, an incidentally imported new organism".[30]

[54] At the time of judgment there were 339 IHSs. They ranged in length from five to over 300 pages.[31] The risk analysis process for a new IHS could take weeks to years depending on the number of pests involved and the amount of scientific information available. The Judge noted, also, that the demand for IHSs outstripped (and always had outstripped) supply and that there were hundreds of outstanding requests for new IHSs and dozens of requests to amend or review current IHSs.[32]

[55] All goods must receive biosecurity clearance before entering New Zealand.[33] Uncleared goods must proceed to a transitional facility or a biosecurity control area.[34] Clearance is granted by an "inspector" appointed by a chief technical officer.[35] To grant clearance, the inspector must be satisfied either that the goods are not risk goods or that the cumulative requirements of s 27(a)–(e) are all met.[36] One of these is that there are no discrepancies in the documentation accompanying the goods

---

30 Section 22(1A), inserted with effect from 9 April 2008.
31 High Court judgment, above n 2, at [199].
32 At [200].
33 Biosecurity Act, s 25.
34 Section 25(1).
35 Sections 26 and 103(1)(a).
36 Provided that there are no restrictions under s 28, which is not relevant here.

(or between that documentation and those goods) suggesting it may be unwise to rely on that documentation.[37]

[56] Plants and plant products fall within the definition of "risk goods" under s 2 of the Act. There was no dispute before us that the June 2009 consignment constituted risk goods. As a consequence, its importation was governed by an IHS, the Nursery Stock IHS.

[57] The Nursery Stock IHS set out "the import specifications and entry conditions for nursery stock imported into New Zealand". It defined nursery stock:

> Whole plants or parts of plants imported for growing purposes, e.g. cuttings, scions, budwoods, marcots, off-shoots, root divisions, bulbs, corms, tubers, rhizomes, and plants *in vitro*.

While pollen is not included in the specific examples, the Nursery Stock IHS plainly applies to pollen. We consider that pollen was intended to be embraced by the phrase "parts of plants", and further pollen was then expressly addressed as nursery stock in cl 2.2.3 of the Nursery Stock IHS.[38]

[58] Imported nursery stock was required to meet "basic conditions" (applicable to nursery stock of any species). They required the obtaining of a permit, labelling, cleanliness and a phytosanitary certificate, as well as other requirements applying to some specified nursery stock. "All nursery stock" was also to undergo a period of PEQ in order to check for the presence of regulated pests and/or diseases.[39] This suggests all pollen imports required PEQ under the Nursery Stock IHS.[40]

[59] Certain imported nursery stock was also required to meet "special conditions". These were set out in the species-specific schedules of special entry conditions in the Nursery Stock IHS. There was an *Actinidia* schedule applicable to kiwifruit.[41] Dormant cuttings and plants in tissue culture were stated to be approved for entry into

---

37 Section 27(b).

38 See below at [61].

39 Nursery Stock IHS, cl 2.2.1.12. The quarantine period was to be a minimum of three months unless otherwise stated in the schedule of special entry conditions.

40 Clause 2.2.1.12 contained some exceptions to PEQ but they do not apply here.

41 The schedule was amended in 2004 after a consultation process in which submissions were made by HortResearch and Zespri.

New Zealand. A phytosanitary certificate and import permit were required. The certificate was required to certify that the cuttings or tissue culture stock had been inspected and found to be free of any visually detectable regulated pests, and (in the case of cuttings only) treated for regulated insects and mites. On entry, the cuttings or tissue culture stock was required to be kept in a level three quarantine facility, grown for a minimum of six months and then inspected, treated or tested for regulated pests. The regulated pest list for *Actinidia* included Psa.

[60] "Quarantine" is defined as meaning the "confinement of organisms or organic material that may be harbouring pests or unwanted organisms".[42] The Director-General may designate any place to be a quarantine area.[43] The Director-General may also approve standards for building, maintaining, or operating transitional facilities.[44] A transitional facility is a place approved pursuant to s 39 of the Act for the purpose of inspection, storage, treatment, quarantine, holding, or destruction of uncleared goods.[45] The Director-General may approve a person to be the operator of the transitional facility.[46]

[61] What, then, of kiwifruit pollen? The only provision that referred specifically to pollen was cl 2.2.3 which stated, somewhat laconically:

> **2.2.3 IMPORTATION OF POLLEN**
>
> An import permit must be obtained from MAF [Biosecurity New Zealand] prior to import.

[62] MAF personnel appear to have held the view that cl 2.2.3 was the only Nursery Stock IHS provision governing pollen. Hence they considered that they had the power to include (or not) PEQ conditions in import permits.[47] No difficulties arose with reference to the few pollen importations prior to 2007 because MAF personnel

---

42 Biosecurity Act, s 2(1).
43 Section 41(1).
44 Section 39(1).
45 Section 2(1).
46 Section 40(3).
47 See above at [29].

adopted a policy of requiring the inclusion of PEQ special conditions. This was described by one MAF official in November 2005 in this way:[48]

> I realise that "our current policy" is to direct everything to a PEQ but this policy is not written down and is therefore, I would think, more easily altered?

However following the PHEL Review that informal policy was revised with the consequence that a PEQ special condition was omitted in some import permits.

[63] The Judge took the view that cl 2.2.3 left import conditions for pollen to be set when an import permit application was received.[49] Implicit in that view is that PEQ was not an IHS requirement for pollen.[50] We do not agree, because we consider that the Nursery Stock IHS basic conditions discussed above were applicable to all nursery stock, including pollen. An import permit could not purport to exclude or reduce that minimum PEQ requirement.

[64] Consequently the mandatory PEQ requirement applied to importations authorised by the 2007 and 2009 permits. The omission of any special condition requiring PEQ did not, and could not, change that, notwithstanding MAF's belief and intention that the omission of a special condition meant that PEQ was not required. However, despite the reference in the permit to the Nursery Stock IHS, within MAF the absence of a special condition for PEQ signalled (erroneously) to inspectors that PEQ was not a requirement.[51]

[65] We return now to the statutory narrative. There are two further subjects requiring attention at this point.

[66] First, any alteration to an IHS may only occur in accordance with the amendment process set out in s 22 of the Act, which mirrors the process for issuing

---

48 In the context of a proposed clivia pollen importation.

49 High Court judgment, above n 2, at [211].

50 The Crown did not contend otherwise. The respondents were equivocal.

51 Indeed in October 2009 cl 2.2.3 of the Nursery Stock IHS was amended to clarify that the requirements for each pollen consignment would be specified on the import permit and assessed on a case-by-case basis. This did not apply to the import in question but illustrates both that there was an understanding in the Plant Imports Team that *only* cl 2.2.3 of the Nursery Stock IHS applied to pollen and that there was confusion among other MAF personnel (including inspectors) as to how the Nursery Stock IHS and import permits interacted.

an IHS. The Director-General may amend an IHS on the recommendation of a chief technical officer.[52] In so doing, the chief technical officer must follow the process set out in s 22(5)–(8).[53] Hence if cl 2.2.1.12 was not to apply to pollen, that could only be achieved by amending the Nursery Stock IHS.

[67] Secondly, there are a number of important miscellaneous provisions in pt 9 of the Act. Section 162A provides a compensation regime, where the exercise of statutory powers for the management or eradication of any organism causes loss.[54] Section 163 provides an immunity for inspectors and others when exercising functions, powers or duties conferred by or under the Act, unless they have acted, or omitted to act, in bad faith or without reasonable cause.[55] And s 164 provides a distinct civil immunity for the Crown when it has goods in its custody.[56]

Issues on appeal

[68] The parties have agreed issues to be determined on appeal and cross-appeal. The definition of issues for determination is invariably a matter for the court to decide; judicial autonomy is not sacrificed at the altar of party-to-party agreement. It always remains for the court to decide and define the issues it considers essential to determine the claim. However we are satisfied the issues defined by the parties here are the appropriate ones for this Court to answer. That said, we take the view they should be answered in a different order to that proposed by the parties. We do so because we consider it necessary to identify *who* may be liable, before identifying whether such persons owe a duty of care to the respondents.

[69] The following, therefore, are the issues we will address:

Issue 1: Direct liability:

(a) Can the Crown be directly liable (as opposed to vicariously liable) in tort?

---

52 Biosecurity Act, s 22(1).
53 See below at [158].
54 See below at [209]–[214] for further discussion of this provision.
55 See below at [112]–[141] for further discussion of this provision.
56 See below at [140] for further discussion of this provision.

(b) What is the impact of any such direct liability on the Crown's liability?

Issue 2: Immunity:

(a) Did the High Court err in holding that s 163 of the Biosecurity Act 1993 did not apply to the acts or omissions of MAF personnel at the pre-border stage?

(b) Did the High Court err in holding that s 163 of the Biosecurity Act 1993 applied to the acts or omissions of MAF personnel at the border clearance stage?

(c) Did the High Court err in holding that the Crown cannot take the benefit of the immunity under s 163 (to the extent it applied to the acts or omissions of any MAF personnel) pursuant to s 6 of the Crown Proceedings Act 1950?

Issue 3: First cause of action — Pre-border negligence:

(a) Did the High Court err in finding that MAF personnel owe a duty of care to Strathboss and some members of the Strathboss class to take reasonable skill and care in their actions or omissions prior to the New Zealand Psa3 incursion to avoid physical damage to property, and to take care to avoid loss consequential on that damage to property?

(b) Did the High Court err in holding that MAF personnel breached their duty of care by the following acts or omissions at the pre-border stage:

(i) the statements made by one of the authors of the PHEL Review to MAF's Plant Imports Team;

(ii) deciding to allow the importation of kiwifruit pollen by the issue of import permits to Kiwi Pollen from April 2007;

(iii) relying on the PHEL Report in making that decision;

(iv) failing to undertake a proper risk analysis before making that decision; and

(v) failing to consult with the kiwifruit industry or other relevant agencies before making that decision?

(c) Did the High Court err in holding that the acts or omissions at the pre-border stage caused the clearance and release of the June 2009 consignment imported by Kiwi Pollen?

(d) Did the High Court err in holding that MAF personnel did not breach their duty of care by the following acts or omissions at the pre-border stage and/or that any breaches did not cause the clearance and release of the June 2009 consignment:

(i) omitting a condition from the import permits issued to Kiwi Pollen from April 2007 requiring microscopic inspection by Chinese officials prior to export;

(ii) changing the wording of the import permits issued to Kiwi Pollen from November 2008 to state that the "pollen may be milled prior to import"; and

(iii) failing to consider the risk posed by kiwifruit pollen imports following the Italian outbreak of Psa3?

Issue 4: Second cause of action — Negligence at the border:

(a) Did the High Court err in holding that MAF personnel owed a duty of care to Strathboss and some members of the Strathboss class in respect of the clearance of the June 2009 consignment?

(b) Did the High Court err in holding that MAF personnel did not breach their duty of care by the following acts or omissions at the border clearance stage and/or that any breaches did not cause the clearance and release of the June 2009 consignment:

(i) failing to inspect the June 2009 consignment; and

(ii) failing to identify the discrepancies in the exporter and the species details between the phytosanitary certificate and the import permit, and to issue a non-compliance report?

Issue 5: Causation:

(a) Did the High Court err in holding that Psa3 entered New Zealand with the June 2009 consignment?

Issue 6: Respondents' cross-appeals on duty of care:

(a) Did the High Court err in finding that those within the Strathboss class would have to show they had property rights in the vines and crops, or that their interest in the vines and crops was sufficiently direct or closely associated with those rights that they should be treated as though they have suffered loss to their property?

(b) Did the High Court err in finding that MAF personnel did not owe a duty of care to Seeka, in its capacity as a PHO, to take reasonable skill and care in their actions or omissions prior to the New Zealand Psa3 incursion to avoid economic loss to Seeka?

ISSUE 1: DIRECT LIABILITY

Issue 1(a): Can the Crown be directly liable (as opposed to vicariously liable) in tort?

[70] The basis of Crown liability in tort falls to be determined by reference to the Crown Proceedings Act. The relevant provisions of that Act at the relevant time were as follows:

> **3 Claims enforceable by or against the Crown under this Act**
>
> …
>
> (2) Subject to the provisions of this Act and any other Act, any person (whether a subject of Her Majesty or not) may enforce as of right, by civil proceedings taken against the Crown for that purpose in accordance with the provisions of this Act, any claim or demand against the Crown in respect of any of the following causes of action:

…

(b) Any wrong or injury for which the Crown is liable in tort under this Act or under any other Act which is binding on the Crown:

…

6 Liability of the Crown in tort

(1) Subject to the provisions of this Act and any other Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject—

(a) In respect of torts committed by its servants or agents;

…

Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate.

[71] The objection raised by the Crown is that, by statute, it may be sued in negligence in these circumstances only vicariously, and not directly. It is said that by failing to identify a particular individual owing a duty of care to the respondents, the judgment has "pieced together" a direct or institutional liability of the Crown based on acts or omissions of its servants not established to be torts in or of themselves.

[72] Let us see, then, what the pleadings allege.

[73] At [121] of the amended statement of claim, in respect of the first cause of action (relating to pre-border issues), the respondents allege:

> At all material times, MAF and officers, agents and/or employees of MAF owed the plaintiffs a duty to exercise reasonable care and skill when undertaking their functions and responsibilities in relation to biosecurity in New Zealand including their functions under [the Act] or otherwise.

The duty is then particularised.

[74] Next, [124] of the claim alleges that "MAF and officers, agents and/or employees of MAF failed to exercise reasonable care and skill" in performing the alleged duties. Further particulars are offered. And at [125], it is alleged that, as a

result of the breaches of duty pleaded in [124], Psa3 was introduced into New Zealand, resulting in the loss alleged. There is then a further pleading, at [126]:

> The breaches of duty by officers, agents and/or employees of MAF pleaded in paragraph 124 above were acts or omissions for which the defendant (on behalf of the Crown) is *also* vicariously liable pursuant to section 6 of the Crown Proceedings Act 1950.
>
> (emphasis added)

[75] A similar form of pleading is advanced in relation to the second cause of action relating to MAF's border procedures.

[76] So the pleading is a hybrid, alleging duty and breach by both the Crown and its employees, and asserting both direct and vicarious liability.

Judgment appealed

[77] The Judge analysed the case as one of vicarious liability, albeit, as we will see, on a somewhat hybrid or "collective" basis. For instance, in respect of duty, the Judge said:

> [497] In all the circumstances it is just, fair and reasonable that *MAF* has a duty of care to those within the class represented by Strathboss who have suffered loss to their property. The wrong to them should be remedied.
>
> (emphasis added)

[78] On the other hand, dealing with breach, the judgment concludes that "[t]he plaintiffs have established MAF personnel breached a duty of care to them in some of the ways alleged."[57] The analysis was not undertaken in respect of any particular MAF employee.

[79] In respect of direct liability, the Judge said:

> [1376] The submissions for the parties also addressed whether the Crown has direct liability for MAF's systemic or collective negligence. As I apprehend it, this was very much a back-up submission for the plaintiffs. The submissions were somewhat light and the subject is a difficult one. The suggestion that there might be direct liability against the Crown was raised in *Couch (No 2)* but not addressed. Had it been necessary to decide this

[57] High Court judgment, above n 2, at [843].

> issue it is likely I would have needed further submissions on the point. In these circumstances I consider it appropriate not to venture any views on the matter.

[80] In the absence of a formal finding of direct liability, we may proceed relatively briskly through the first issue. It arises because the respondents seek, alternatively, to contend that the Crown is liable directly in this case.

Submissions

[81] The Crown's complaint is that the first major error of the judgment is a failure to identify a negligent individual. It is said that the references to MAF generally in the judgment, and the absence of any consideration of what duty particular individuals may have owed and to whom, reflects a misunderstanding of how Crown liability works under the Crown Proceedings Act. Mr Hodder QC submits that the Crown might be sued in tort vicariously only, and cannot be sued directly at all.[58] It is orthodox that the Crown's liability in tort is vicarious only. That was the position at common law, and the Crown Proceedings Act retained, rather than reformed, that principle. In consequence the respondents and the judgment needed to identify an individual who was negligent, that is who owed a duty of care to the respondents and breached that duty so as to cause loss. Mr Hodder submits that the judgment had essentially pieced together a direct or institutional liability, while at the same time, as we have seen,[59] denying that that was the approach being taken at all.

[82] For the respondents, Mr Galbraith QC contends that in *R v Williams* the Judicial Committee of the Privy Council recognised a direct liability against the Crown in New Zealand.[60] He submits, further, that in introducing the Bill which became the Crown Proceedings Act,[61] there was nothing to indicate that New Zealand citizens were to be deprived of legal rights long enjoyed. The Act, therefore, did not intend to abrogate the existing right recognised in *R v Williams* enabling the Crown to be held liable directly in tort. Section 3(2) of the Crown Proceedings Act recognises direct liability against the Crown. Section 6(1)(a), on which the Crown relies, is

---

58 Subject to the three exceptions under s 6(1)(b)–(c) and (2) of the Crown Proceedings Act 1950, which are inapplicable here.
59 See above at [79].
60 *R v Williams* (1884) NZPCC 118.
61 Crown Proceedings Bill 1950 (67-1).

(on Mr Galbraith's argument) directed solely to the Crown's *vicarious liability* in tort. Mr Galbraith submits, further, that this approach is supported by s 27(3) of the New Zealand Bill of Rights Act 1990. That provides:

> Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

Accordingly, the default position is that citizens have a right to bring civil proceedings against the Crown, and to have those proceedings heard and determined according to law in the same way as civil proceedings brought against individuals. Section 27(3) is purposed on the basis of the removal of any procedural or jurisdictional privileges of the Crown.[62]

Analysis

[83] At common law, the Crown was not liable directly in tort. There were a number of reasons for that principle developing, which occurred in about the 13th century. One was the principle that "the King can do no wrong". It followed no action for tort would lie against the Crown. The principle of *respondeat superior* was inapplicable to the Crown.[63] A further underpinning principle was that the King could not be sued in his own courts, as a matter of procedure. On the other hand, the King's servant or agent *could* be sued personally, for his or her own torts.[64]

[84] These rules were relaxed in about the 14th century by the petition of right procedure. The King was not above the law, and would respond to a proper case, upon inquiry by commissioners.[65] That did not, however, assist in the case of tort, where no such petition lay.[66] In the case of tort, the aggrieved subject had to sue the individual

---

62 Referring to *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at [87].

63 Thomas Barnes "The Crown Proceedings Act, 1947" (1948) 26 Can Bar Rev 387 at 387–388.

64 Peter W Hogg, Patrick J Monahan and Wade K Knight *Liability of the Crown* (4th ed, Carswell, Toronto, 2011) at 4–5; Stuart Anderson "'Grave injustice', 'despotic privilege': the insecure foundations of crown liability for torts in New Zealand" (2009) 12 Otago LR 1 at 5; and WS Holdsworth "The History of Remedies Against the Crown" (1922) 38 LQR 141 at 142–145. Professor Peter Hogg CC, QC, FRSC, the New Zealander who became Canada's leading constitutional scholar, died on 4 February 2020.

65 Hogg, Monahan and Knight, above n 64, at 5.

66 See, for example, Glanville L Williams *Crown Proceedings* (Stevens & Sons, London, 1948) at 16, citing *Canterbury v Attorney-General* (1842) 1 Ph 306, 41 ER 648 (Ch). A petition of right might however lie against the Crown for conversion of property, but that appears to be the only excepted tort.

tortfeasor. In practice the Crown would stand behind its servant and pay damages. It might provide assistance, but not invariably so. One particular difficulty was the inability to obtain discovery against the Crown.[67] The intending plaintiff might be unable to identify which Crown servant to sue. In practice however the Crown would assist (without formal discovery) and would submit to arbitration or compensation.[68] Alternatively, the Crown might dispute whether the tortfeasor was in fact its servant, whether he or she was acting in the course of employment, or whether a duty of care was owed by that individual to the intended plaintiff.[69]

[85] The latter point was of particular importance in relation to occupiers' liability, where no servant of the Crown could be said to owe a duty of care in respect of the Crown's property. Again, to an extent, the Crown was prepared to help. It might nominate a servant against whom proceedings could be taken, as "nominal defendant", and agree not to raise the point that this servant owed no duty of care.[70]

[86] But in *Adams v Naylor*, the House of Lords condemned the practice.[71] There, negligence on the part of the British Army resulted in a minefield no longer being adequately signposted. Two boys were injured, one fatally. Captain Naylor of the Royal Engineers was nominated by the Treasury Solicitor as defendant. Despite that fact, and the fact the Crown did not wish to contest duty on the part of the defendant, the House of Lords held it was not open to the parties to have the matter dealt with by agreement on the false footing that the nominal defendant was the duty-owing occupier.[72] Consequently, no compensation was payable.

[87] Something had to be done about that entirely regrettable result.

[88] In New Zealand amelioration, and then constriction, came by statutory means. And it came long before *Adams v Naylor*. The process was traced by Professor Anderson in his 2008 F W Guest Memorial Lecture.[73] The Crown Redress

---

67 Joseph M Jacob "The Debates Behind An Act: Crown Proceedings Reform, 1920–1947" [1992] PL 452 at 455.
68 Williams, above n 66, at 17.
69 At 17–18.
70 At 18.
71 *Adams v Naylor* [1946] AC 543 (HL).
72 See, for example, at 555 per Lord Uthwatt.
73 Anderson, above n 64, at 12–18.

Act 1877 enabled direct liability in tort for acts which the Government "would be responsible if they were private subjects of Her Majesty in New Zealand".[74] This was followed by the Crown Suits Act 1881, intended to simply consolidate the law but "written with much more caution" than the 1877 Act, omitting the final general words of the 1877 Act referred to above.[75] Thus arose the decision on which the respondents rely, *R v Williams*.[76] A suit was brought directly against the Crown for negligence in failing to remove a known snag (a submerged tree stump) beneath the coaling wharf at Westport. The snag had caused the respondent's collier to sink. The advice of the Privy Council contains no doubt as to jurisdiction on the basis of direct liability; the Crown's liability was sustained on appeal. There is no suggestion that such liability existed at common law apart from the 1881 Act.[77]

[89] Further legislation was passed in New Zealand, including the Crown Suits Act 1908. A 1910 amendment then provided that the Crown assumed liability for "[a]ny wrong or injury which is independent of contract and for which an action for damages would lie if the defendant was a subject of His Majesty".[78] There were some exceptions provided for, and some immunities.[79]

[90] That, then, was the position in New Zealand before the Crown Proceedings Act was enacted in 1950. To understand the rationale for that legislation, one has to return to England. There the legal position was as described earlier, save that statute had gradually resulted in some local government entities becoming liable on the basis of vicarious liability. But the Crown itself remained immune from liability in tort, subject to the rather perverse nominal defendant procedure.[80]

[91] How the Crown Proceedings Act 1947 (UK) came to be enacted is the subject of a remarkable article by Joseph Jacob of the London School of Economics.[81] By painstaking research at the Public Records Office, Jacob has traced the reform of

---

74 Crown Redress Act 1877, s 3.
75 Anderson, above n 64, at 14–15.
76 *R v Williams*, above n 60.
77 At 129–130.
78 Crown Suits Amendment Act 1910, s 3(c).
79 See ss 4 and 8–9; and Anderson, above n 64, at 16.
80 Anderson, above n 64, at 17.
81 Jacob, above n 67. We refer to the Crown Proceedings Act 1947 (UK) 10 & 11 Geo VI c 44 as the English Act hereafter.

the English common law through to the English Act. The impetus came from trading interests (in particular Liverpool shipping interests) now interacting more regularly with the Crown:[82]

> [T]he world wars in particular saw large increases in the state's trading activities, and "lawyers and business men urged … that the State should be placed in the same position as the subject in the courts of law".

[92] A committee was formed in the early 1920s to consider the technical implications of drafting legislation regarding Crown liability under the chairmanship of Sir Gordon Hewart, then Attorney-General and later Lord Chief Justice.[83] It reported in 1927, producing what was later described by Lord Jowitt as "structurally, not a very satisfactory Bill".[84] The perceived cost of greater Crown liability stifled reform at a time of economic stringency, and then nothing very much occurred until after the Second World War when *Adams v Naylor*, in which the families of the children killed and injured on the inadequately signposted minefield went without remedy, caused public outrage.[85] The new Lord Chancellor, Jowitt, grasped the nettle.[86]

[93] What is entirely clear is that the English Act places the Crown liability for tort on a primarily vicarious (rather than direct) basis. This was a compromise, the product of a need to placate the service departments (particularly the Admiralty) as well as to placate public opinion in light of the profoundly regrettable result in *Adams v Naylor*. In consequence, the English Act provided, at s 2:

> (1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:—
>
> (a) in respect of torts committed by its servants or agents;
>
> …
>
> Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart

---

82 At 453 and 455, citing Barnes, above n 63, at 389. Sir Thomas Barnes was the Treasury Solicitor at the time the English Act was enacted and closely involved in the reforms.

83 At 459.

84 (4 March 1947) 146 GBPD HL 65.

85 See above at [86]–[87].

86 Jacob, above n 67, at 477–480.

> from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate.

[94] As Professor Anderson observes:[87]

> The resulting statute, Crown Proceedings Act 1947 [(UK)], made the [C]rown liable for torts for the first [time] in English legal history, but (exceptions aside) it was only vicarious liability — because that is what the reformers of the 1920s had thought achievable, wrongly as it turned out. And it is that section that was copied into the New Zealand Crown Proceedings Act of 1950, almost word for word.

[95] The New Zealand Crown Proceedings Act was an entirely advertent imitation of the English Act.[88] Section 6 of our Act is almost word for word the same as s 2 of the English Act.[89] The drafters were well aware that the New Zealand and English positions began at different starting points. This is what the explanatory note observes:[90]

> *Clause 6* defines the circumstance in which the Crown is to be liable in tort. It follows section 2 of the United Kingdom Act, but lacks the significance of that section which made the Crown in the United Kingdom liable in tort for the first time. The Crown in New Zealand has been liable in tort since the enactment of sections 3(c) and 4 of the Crown Suits Amendment Act, 1910.

[96] In fact, as we have seen, the Crown's direct liability pre-dated 1910, going back at least to 1877. The former Labour Attorney-General, the Hon H G R Mason QC MP, referred to that fact in the third reading debate.[91] But the parliamentary debate focused on procedural advantages, in particular removal of the rule that the Crown could not be impleaded with other defendants. Of a shift from direct to vicarious liability, it makes no mention.

[97] But the fact that the English Act premised liability in tort on a vicarious rather than direct basis should have been appreciated. The point was made perfectly clear in Glanville Williams' 1948 treatise on *Crown Proceedings*.[92] Whether or not the legislators entirely appreciated the point in 1950, the consequence was certainly

---

87 Anderson, above n 64, at 17.
88 At 18.
89 See above at [70].
90 Crown Proceedings Bill 1950 (67-1) (explanatory note) at i.
91 (10 November 1950) 293 NZPD 4134.
92 Williams, above n 66, at 44.

apparent soon after the legislation was introduced. Mr Currie's 1953 New Zealand treatise on *Crown and Subject* is clear on the point:[93]

> … the Crown is under no direct common-law liability for tort as such. In a few cases a suppliant could, waiving the tort, recover property wrongfully detained or moneys wrongfully received. Its liability now arises under s 6 of the Crown Proceedings Act 1950. The liability is for the most part vicarious, and related to the wrongful acts and defaults of the Crown's various classes of servants and other agents.

[98] The net result of all this is, as Professor Anderson observes, "[t]he rule in both England and New Zealand is that the [C]rown cannot be sued in tort for [direct] liability".[94] This he condemned:[95]

> The statutory limitation of torts liability to vicarious liability is an embarrassment to our law, and a distortion of it. It has no principled justification, and never has had. It is the result of accidents of English history. It was brought into New Zealand law as a substitute for an indigenous rule that by then had its limitations, but was a rule based upon principle.

[99] Whatever the rights or wrongs of the matter may be as a matter of policy, we venture to suggest that the law in this respect is entirely clear. We have already cited the works of Mr Currie and Professor Anderson. To those might be added three further references.

[100] First, the judgment of this Court in *Crispin v Registrar of District Court*.[96] In that case Mr Crispin, an electrician, had been erroneously recorded as a judgment debtor in the civil record book by a District Court Deputy Registrar. His claims in defamation and negligence were struck out in the High Court on the basis of the immunity in s 6(5) of the Crown Proceedings Act. On appeal, Cooke P observed:[97]

> Claims in tort based on actions or omissions of Crown servants can be put forward in three ways. First, there can be an action against the Crown, commonly represented by the Attorney-General, under the Crown Proceedings Act 1950, alleging vicarious liability on the part of the Crown. Secondly, there can be an action against the individual employee or employees alleged to have committed the tort: this would be against them personally, named as individuals, although it would often be the case that the Crown as a good employer would stand behind them financially. Thirdly, where a statute

---

93 AE Currie *Crown and Subject* (Legal Publications, Wellington, 1953) at 73 (footnote omitted).
94 Anderson, above n 64, at 18.
95 At 21.
96 *Crispin v Registrar of the District Court* [1986] 2 NZLR 246 (CA) at 254.
97 At 255.

> or subordinate legislation so permits, there may be an action against the holder of an office named simply as such holder: a class of case in which the legislation authorises the holder of the office for the time being to be sued eo nomine.

[101] Secondly, the leading New Zealand academic authority on tort law, *Todd on Torts*, evaluates the authorities and concludes, in terms admitting no doubt on the matter:[98]

> … any liability in tort must be found in the Crown's vicarious liability for wrongdoing by Crown servants or agents or in any direct liability of Crown corporations. The liability of the Crown cannot be [direct] in nature.

[102] Thirdly, in December 2015 the Law Commission issued the report *The Crown in Court*. This was the product of a lengthy and careful consideration of the Crown Proceedings Act. The report recommends a new Crown Proceedings Bill which would enable the Crown to be sued directly in tort as opposed to vicariously. In making that recommendation, the Law Commission noted:[99]

> The Crown could be "sued" directly in New Zealand before the 1950 Act, although currently, the Crown can only be sued vicariously, with limited exceptions in the Act.

[103] The Law Commission went on to state that in most cases, a plaintiff attempting to sue the Crown in tort must first establish that an employee of the Crown has committed a tort — that is, liability is vicarious. The report continues:[100]

> This requirement creates significant difficulties when it is alleged that the Crown or a government department as a whole has breached its obligations (systemic negligence).

[104] The report also notes:[101]

> The Crown Proceedings Act effectively establishes a bar against suing the Crown directly in tort with the exception of the very limited classes of claims available under sections 6(1)(b), 6(1)(c) and 6(2). This bar is felt most sharply in the case of negligence claims but applies equally to other torts. The Crown can only be held vicariously liable in tort for the acts and omissions of Crown employees. Consequently, in order to sue the Crown in negligence, a potential claimant must identify a particular Crown employee

---

98 Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 1268 (footnote omitted).

99 Law Commission *The Crown in Court* (NZLC R135, 2015) at [2.13] (footnotes omitted).

100 At [2.6].

101 At [3.8].

> and allege that he or she has committed a tort. However, if no particular Crown employee has committed a tort or it is alleged that the government department as a whole has failed or it is claimed that a number of government departments have collectively failed, a person harmed (in circumstances where there would otherwise be legal redress) may be left without any redress against the Crown.

[105] If the respondents' contention is correct, we would be left with the remarkable conclusion that the fundamental premise on which the Law Commission report proceeded was entirely wrong, and that the reform for which it contends had been effected already, without the Law Commission appreciating that event.[102]

[106] We turn now to an argument Mr Galbraith made that attracted us briefly. It was that the limitation in ss 3(2)(b) and 6(1)(a) of the Crown Proceedings Act, in combination, have been ameliorated by s 27(3) of the New Zealand Bill of Rights Act.[103]

[107] As Elias CJ noted in *Attorney-General v Chapman*, that section was enacted in the form proposed in the White Paper.[104] The commentary in the White Paper records:[105]

> [10.176] [The provision is] designed to give constitutional status to the core principle recognised in the Crown Proceedings Act 1950: that the individual should be able to bring legal proceedings against the Government, and more generally to engage in civil litigation with it, without the Government enjoying any procedural or jurisdictional privileges. This is central to the rule of law.
>
> …
>
> [10.178] Again the phrase "according to law" will enable the right to be regulated by legislation (at the moment the Crown Proceedings Act 1950) and by the common law. This could if necessary be invoked to uphold the law of public interest immunity. …

---

102 In due course the Government rejected the Law Commission's proposal that the Crown be liable directly in tort, citing "significant constitutional and fiscal" consequences if the proposal were adopted: *Government Response to the Part A of the Law Commission's report: The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings* at 3.

103 See above at [82].

104 *Attorney-General v Chapman*, above n 62, at [87].

105 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6.

[108] In our view this provision, while of fundamental importance, does not have the effect of introducing direct Crown liability for tort in place of ss 3(2)(b) and 6(1)(a) of the Crown Proceedings Act. There are two reasons for that view. The first is that, as the White Paper makes clear, the limitation "according to law" embraces rather than reforms the regulatory legislation in the Crown Proceedings Act. The second is that, if the New Zealand Bill of Rights Act had the liberating effect claimed for it by the respondents, it went entirely unnoticed by the Law Commission in its 2015 report, and by the authors of the leading text on the New Zealand Bill of Rights Act, *The New Zealand Bill of Rights Act: A Commentary*.[106] That suggests to us that the respondents' contention cannot be correct, and that it represents an adventitious rather than accurate analysis of the statute.

Conclusion

[109] The answer to Issue 1(a) is that the Crown cannot be liable directly in the circumstances of this case. Its liability, if any, must be vicarious. That is the product of statutory reform in 1950. If the position is to change, that too must be the product of careful, incremental statutory (rather than common law) reform, as the Law Commission recognised in 2015.

Issue 1(b): What is the impact of any such direct liability on the Crown's liability?

[110] Given the conclusion we reach on Issue 1(a), Issue 1(b) does not fall for decision by us.

[111] It follows the respondents must first identify direct liability on the part of individual Crown servants or agents before the Crown can be vicariously liable for such actions under the Crown Proceedings Act.

---

[106] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [25.4.6]–[25.4.11].

ISSUE 2: IMMUNITY

Issue 2(a): Did the High Court err in holding that s 163 of the Biosecurity Act 1993 did not apply to the acts or omissions of MAF personnel at the pre-border stage?

[112] As noted earlier, s 163 of the Act provides an immunity for inspectors and others:

> **163 Protection of inspectors and others**
>
> An inspector, authorised person, accredited person, or other person who does any act or omits to do any act in pursuance of any of the functions, powers, or duties conferred on that person by or under this Act or a pest management strategy shall not be under any civil or criminal liability in respect of that act or omission, unless the person has acted, or omitted to act, in bad faith or without reasonable cause.

The Crown says it applies to all individual MAF personnel who might here be liable to the respondents, and that the Crown takes the benefit of that immunity via s 6 of the Crown Proceedings Act. The respondents say the immunity applies to neither pre-border nor border personnel, and that in any event it is inapplicable where reasonable care has not been exercised.

Judgment appealed

[113] The Judge identified two issues of interpretation.[107] The first was what was meant by "conferred … by or under this Act". If that did not apply to the actions or omissions of the relevant MAF personnel, then the question of whether the Crown could have the benefit of s 163, via the Crown Proceedings Act, did not arise. If s 163 did apply to those personnel, the second issue was whether those actions or omissions were "without reasonable cause". As the Judge noted, in that case MAF personnel would not have the benefit of the provision, and nor would the Crown via the Crown Proceedings Act.

[114] On the first question, the Judge considered the provisions of the Act, and noted that it conferred particular powers, functions and duties on the Minister, Director-General, chief technical officers, deputy chief technical officers, inspectors,

---

[107] High Court judgment, above n 2, at [1317]–[1318].

authorised persons and accredited persons.[108] The chief executive of a department (here, the Director-General) was permitted to delegate functions under any Act to an employee, under s 41 of the State Sector Act 1988. The issuing of a permit under an IHS was a matter for the Director-General. The permits in this case were delegated by the Director-General to an "authorised person". The Act did not make provision for such delegation, but delegation would be permissible under s 41.[109]

[115] The Judge considered that the Act had a carefully considered and detailed framework for conferring powers on or under the Act. It applied to "inspector[s], authorised person[s], accredited person[s], or other person[s]" who may have powers, functions and duties conferred on them by a chief technical officer. The Judge considered that s 163 was intended to provide protection from liability to those persons provided they did not act in bad faith and without reasonable cause.[110] However she concluded that MAF pre-border personnel in the Plant Imports team, PHEL or other MAF groups were not appointed under the Act and did not have powers, duties or functions specifically conferred on them by or under the Act.[111] Section 163 of the Act did not apply to MAF personnel employed by MAF to assist the Minister and other officers to administer the Act. It did not therefore apply to MAF personnel involved in the decision to issue Kiwi Pollen's import permit. But it did apply to the inspectors at the border who are appointed by a chief technical officer under the Act.[112]

[116] On the second question, the meaning of "reasonable cause", the Judge noted the competing contentions of the parties.[113] She concluded that the Crown's submission was the more natural reading of the Act. The words "without reasonable cause" concerned the *purpose* of the function, power or duty undertaken. It was not about *how well* the person carried out that function, power or duty. The provision offered a broader immunity to persons acting under the Act than contended for by the respondents:[114]

---

108 At [1320]–[1329]. See also Biosecurity Act, ss 8, 22 and 101–105.
109 At [1323]–[1324].
110 At [1329].
111 At [1330].
112 At [1329] and [1332]–[1333].
113 At [1335]–[1336].
114 At [1337].

> As long as persons acting under the Act have not acted in bad faith and have a proper reason for taking the action (or omissions) they have, they will not have liability.

[117] The effect of the respondents' argument would have been that "a person exercising statutory functions can never have reasonable cause to act without reasonable care".[115] The different choice of wording, contrasting s 164 in which the words "reasonable care" were used, suggested a deliberate distinction intended by Parliament.[116] Section 164 provides:

> **164 Liability for goods**
>
> The Crown shall not be under any civil liability in respect of any loss or damage to any goods suffered—
>
> (a) While those goods are in the custody of the Crown by reason of the exercise, in good faith and with reasonable care, of authority under this Act; or
>
> (b) As a result of or in the course of any treatment, handling, or quarantine of those goods undertaken or required in good faith and with reasonable care by an inspector or any other person acting in the exercise of authority under this Act.

The Judge concluded:

> [1353] I conclude that "without reasonable cause" in s 163 was deliberately chosen because it was intended to apply to wide ranging powers, exercised in the public good for the purposes of the Act, and likely to cause loss. It was intended to provide a broad immunity for those who are exercising functions, powers, or duties specifically conferred on that person by the Act, pest management plan or pathway management plan and who may not have the protection under s 86 of the State Sector Act. …

[118] The Judge then moved on to consider the application of s 86 of the State Sector Act. At the relevant time it provided:

> **86 Protection from liability**
>
> No chief executive, or employee, shall be personally liable for any liability of the Department, or for any act done or omitted by the Department or by the chief executive or any employee of the Department or of the chief executive in good faith in pursuance or intended pursuance of the functions or powers of the Department or of the chief executive.

---

115 At [1336].
116 At [1342]–[1343].

[119] Following the *Couch* litigation and after the events in issue here,[117] s 6(4A) of the Crown Proceedings Act was enacted.[118] That provided:

> Despite certain Crown servants being immune from liability under section 86 of the State Sector Act 1988,—
>
> (a) a court may find the Crown itself liable in tort in respect of the actions or omissions of those servants; and
>
> (b) for the purpose of determining whether the Crown is so liable, the court must disregard the immunity in section 86.

[120] The Judge accepted the respondents' submission that that amendment should be taken as parliamentary confirmation that the majority in *Couch v Attorney-General (No 2)* had misconstrued s 86, and that the view expressed by McGrath and Wilson JJ should be preferred.[119] The majority in *Couch (No 2)* concluded that s 86 had limited effect, removing liability in tort for the acts of others, but not the personal acts of the protected chief executive and employees themselves.[120] The minority construed the provision as excluding personal liability for personal acts performed in good faith.[121] In accordance with the minority, the Judge concluded that the protection MAF personnel have under s 86 did not protect the Crown from vicarious liability under the cause of action concerning pre-border activities.[122] That was because the minority in *Couch (No 2)* construed s 6(1) of the Crown Proceedings Act as excluding Crown liability only where the servant or agent enjoyed immunity as a private person: "It does not exclude Crown liability where the servant is immunised on account of being a Crown servant, which is the effect of s 86."[123]

Submissions

[121] The Crown submits that the statutory immunity in s 163 applies to the Minister, Director-General, and to the MAF personnel identified in both pts 4 and 5 of the judgment (being the relevant pre-border and border personnel). Mr Hodder

---

117 See *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 [*Couch (No 2)*].
118 State Sector Amendment Act 2013, s 62(4).
119 High Court judgment, above n 2, at [1356].
120 *Couch (No 2),* above n 117, at [7], [71] and [173]–[174].
121 At [193] and [250].
122 High Court judgment, above n 2, at [1358].
123 *Couch (No 2)*, above n 117, at [189].

submits, further, that "reasonable cause" does not mean "reasonable care", but invokes the language of misfeasance of public office. It is concerned with purpose, rather than with how well a function is performed. The Crown itself receives the benefit of the s 163 immunity via s 6 of the Crown Proceedings Act.

[122] The respondents submit that s 163 applies to neither of the relevant pre-border or border personnel addressed in pts 4 and 5 of the judgment, there being insufficient evidence to establish that any of them had been appointed and had powers conferred on them such they could rely on that provision. In doing so Mr Heard (who presented the argument on this issue for the respondents) adopts substantially the reasoning of the Judge in respect of pt 4. He submits that s 163 is essentially a conditional personal immunity for the exercise of specific statutory powers and duties conferred on specific persons, and exercisable only by the person on whom the power is conferred. It only applies to acts or omissions done in pursuance of functions, powers, or duties conferred on specific persons by or under the Act. The distinction between conferral *by* and conferral *under* the Act is recognition that some powers and duties are conferred on specific office holders expressly by the statute (eg the powers conferred on the Minister under s 9) and other powers are conferred by persons who have the power to appoint specific officers under the Act (eg when a chief technical officer appoints an inspector under s 103, he or she has the power to specify the powers the inspector will have).[124] In the latter example, he submits, powers are not conferred by the Act, but rather conferred under it.

[123] Mr Heard also submits that the meaning of "reasonable cause" in s 163 of the Act encompasses "reasonable care". No discernible pattern exists in legislative immunity provisions, and the parliamentary debates do not assist here. However, as an immunity is established, a "jealous interpretation" ought to be applied.[125] That would best be achieved by construing "without reasonable cause" as including "without reasonable care", to ensure the immunity in s 163 is not "overbroad".

---

124 Biosecurity Act, s 103(6).
125 Referring to *De Bres v McCully* [2004] 1 NZLR 828 (HC).

Analysis

[124] Four preliminary observations may be made.

[125] The first is that s 6(4A) of the Crown Proceedings Act took effect only in July 2013, well after the events at issue in these proceedings. There is no basis for reading it as having any retrospective effect. We therefore consider the decision of the majority in *Couch (No 2)* remains binding on this Court. We do not consider the subsequent legislative amendments to s 6 of the Crown Proceedings Act and s 86 of the State Sector Act permit us to depart from that decision.

[126] The second preliminary observation we make is that the majority analysis in *Couch (No 2)* did not proceed on the basis that only immunities available to private citizens undertaking private activities are embraced by the proviso to s 6(1). That was the minority's reasoning, but it was rejected by the majority. Rather, the majority proceeded on the basis that should statute exclude the personal liability of a Crown servant, then the effect of the proviso to s 6(1) is that the Crown is no longer vicariously liable.[126]

[127] Thirdly, the only immunity the Crown could point to in the *Couch* litigation was s 86 of the State Sector Act. The majority analysis of that provision, which we consider remains binding on this Court in this case, is that it serves only an internal purpose. That is, it provides the negligent Crown servant an immunity against recovery by his or her employer, the Crown. However, s 86 gave the servant no immunity against liability to an external plaintiff.[127] One might argue about that interpretation, and the minority did not accept it,[128] but we will not argue about it here. It binds this Court and we will apply it.

[128] Fourthly, it follows that if the Crown were reliant on s 86 as it formerly was in respect of these acts committed in 2006–2009, it would be in difficulty. But the Crown puts s 86 to one side and, applying the majority analysis of s 6 of the Crown Proceedings Act in *Couch (No 2)*, invokes instead s 163 of the Act. This, it says, is a

---

126 *Couch (No 2)*, above n 117, at [176].
127 At [173]–[174].
128 At [193].

broader-cast immunity than s 86. It excludes primary liability on the part of each individual MAF servant or agent who might have owed (and breached) a duty of care to the respondents, whether pre-border or at the border.

[129] The real question for us, on this issue, is whether that submission is correct.

[130] For convenience we repeat s 163:

> **163 Protection of inspectors and others**
>
> An inspector, authorised person, accredited person, or other person who does any act or omits to do any act in pursuance of any of the functions, powers, or duties conferred on that person by or under this Act or a pest management strategy shall not be under any civil or criminal liability in respect of that act or omission, unless the person has acted, or omitted to act, in bad faith or without reasonable cause.

[131] A number of points may be made about this provision. First, it is one of a number of miscellaneous provisions towards the end of the Act. Three of those provisions concern liability or compensation.[129] Secondly, the exclusion of liability itself could hardly be broader. Subject to the occupational and functional qualifications set out in the first half of the provision, and the proviso at the end of the second, the exclusion is "any civil or criminal liability". Thirdly, s 163 was enacted in 1993, five years after s 86 of the State Sector Act. The effect of s 86, *Couch (No 2)* holds, is to exclude internal liability of chief executives and departmental employees, to the Crown, for their actions. It may be inferred that s 163 probably does something else, then. It is certainly freighted with qualifications not contained in s 86. We will revert to these in a moment. But on its face, it is a complete exclusion of personal liability, and we see no warrant in its terms to limit its application to internal plaintiffs (unlike s 86).

[132] We turn now to the occupational and functional qualifications at the start of s 163. Necessarily we take them together. The immunity (or "protection") is available only to an "inspector, authorised person, accredited person, or other person who does any act or omits to do any act in pursuance of any of the functions, powers, or duties conferred on that person by or under this Act or a pest management strategy".

---

[129] See above at [67].

As Mr Hodder submits, s 8 of the Act makes the Minister responsible for the administration of the Act, and for its co-ordinated implementation. Explicitly or implicitly officials may, by a general principle of public law, exercise the Minister's powers of administration.[130]

[133] Bearing that in mind, and in contrast to the Judge, we do not read s 163 as confined to those persons who "have powers, duties or functions specifically conferred on them by or under the Act".[131] The Judge's adoption of the word "specifically" dramatically reduces the range of officials performing the Minister's statutory responsibilities under Act to whom the protection might apply. In our view it does so without a particularly discernible, satisfactory reason. A significant rationale offered by the Judge was that MAF personnel whose powers were not specifically conferred under the Act did not require the protection from civil or criminal liability provided by s 163, because "[t]hey have the more extensive protection provided by s 86 of the State Sector Act."[132] But that was based on the Judge's adoption of the interpretation of s 86 proposed by the minority in *Couch (No 2)*, in light of subsequent legislative amendment, a course we do not consider to be open.[133]

[134] The Judge analysed carefully the Act and the powers of appointment of an "inspector", "authorised person" and "accredited person".[134] But s 163 is wider than that in extending to "other persons". Presumably it must have been intended to apply to the Minister himself, given the allocation of all administrative responsibilities to the Minister in the first place. Likewise, the Director-General and chief technical officers who do not obviously fit within the other descriptors. We do not accept Mr Heard's argument that this might then incorporate members of the public upon whom duties may be imposed under the Act. The protection relevantly relates here to the performance of responsibilities imposed in the first place generally upon the Minister (or otherwise specifically allocated by the Act) and then delegated to MAF personnel whether named or not within the Act.

---

130 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [47], citing *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 (CA).
131 High Court judgment, above n 2, at [1330].
132 At [1332].
133 See above at [125]–[126].
134 High Court judgment, above n 2, at [1323]–[1329].

[135] We agree with Mr Hodder no logical reason is apparent to distinguish, for the purposes of immunity, between those formally appointed in terms of the Act and those who provide the advisory and administrative support to those people. The approach adopted at first instance, incorrectly premised on an alternative immunity being available under s 86 of the State Sector Act, would result in large swathes of those performing the Minister's administrative functions under the Act being exposed to personal liability to third parties. As Mr Hodder submits, that would encourage litigants to alter the point of attack from the formal decision-maker under the statute, to those advising the decision-maker. And it would render s 163 a ragged blanket without an apparent rationale for inclusion and exclusion.

[136] Each of the individuals identified as potentially bearing (and breaching) a duty of care to the respondents was a MAF employee. One of the individuals singled out by the respondents, Dr Card, may have been on a temporary contract, but his work was supervised by Dr Clover, a permanent employee and team manager of the MAF Plant Health and Environment Laboratory. We take the view that the words "under this Act" should be construed as referencing functions, powers or duties granted indirectly as well as directly. MAF personnel who perform or assist with the performance of the Minister's functions under s 8 fall within s 163.

[137] We turn, finally, to the proviso at the end of s 163. It takes the form of a disqualification, rather than a qualification. That is important because the premise is the protection applies to the performance of functions under the Act, and the proviso then withdraws it. A MAF employee otherwise enjoying immunity under s 163 will lose that protection if their act or omission occurred "in bad faith or without reasonable cause". There is no suggestion here of bad faith. The issue is whether the words "without reasonable cause" apply here because of a want of due care.

[138] It may be observed that the legislative drafting of statutory immunities for persons performing statutory functions tends to fall within six broad categories (set out in descending order of extent). Crown and/or personal liability may be excluded:

(a) altogether, without qualification;[135]

(b) so long as the act (or omission) was done in good faith (or unless the act was done in bad faith);[136]

(c) unless the act (or omission) was done "in bad faith or without reasonable cause" (which is what s 163 provides) (or the act was done "in good faith and with reasonable cause");[137]

(d) unless the person concerned "has not acted in good faith or has been grossly negligent";[138]

(e) unless the act (or omission) was done "in bad faith or without reasonable care" (or "in good faith and with reasonable care", which is what s 164 provides);[139] and

(f) (rarely) provided reasonable grounds for the act existed.[140]

[139] The last of these is rare, presumably because it is the least extensive in effect. But it may be observed that Crown immunity provisions are common, conventional and current.[141] They take disparate forms, and the draftsperson and Parliament may be taken to have chosen the form (and therefore, the extent) of the immunity deliberately. Each has a different effect, and therefore extent.

---

135 Maritime Transport Act 1994, s 256; Animal Products Act 1999, s 61A; Dairy Industry Restructuring Act 2001, s 37; Meat Board Act 2004, s 80; and Intelligence and Security Act 2017, ss 110–111.

136 Wild Animal Control Act 1977, s 32; State Sector Act, s 86; Civil Aviation Act 1990, s 80I; Financial Transactions Reporting Act 1996, s 17 (since repealed); and Trade Marks Act 2002, s 157.

137 Wildlife Act 1953, s 60; Fisheries Act 1996, s 220; Agricultural Compounds and Veterinary Medicines Act 1997, s 63; Climate Change Response Act 2002, s 106; Food Act 2014, s 351; and Biosecurity Act, s 163.

138 Passports Act 1992, s 37B; and Customs and Excise Act 2018, s 311.

139 Health Act 1956, s 129; Misuse of Drugs Act 1975, s 34; Medicines Act 1981, s 102; Ship Registration Act 1992, s 64; Hazardous Substances and New Organisms Act 1996, s 139; Intelligence and Security Act, ss 31–32 and 43–44; and Biosecurity Act, s 164.

140 Ship Registration Act, s 73.

141 The most recent of the provisions noted above is from 2018 legislation.

[140] The Judge analysed this issue in some depth.[142] In short, the Judge found the words "in bad faith or without reasonable cause" in s 163 stand in contradistinction to those in the immediately following provision, s 164 ("in good faith and with reasonable care") — and are concerned with purpose rather than performance. We agree, a conclusion assisted by the legislative record noted at [138] and [139] above which the Judge did not consider explicitly. As Mr Hodder puts it, the expression "reasonable cause" is associated with misfeasance in a public office and reckless disregard.[143] Unlike Mr Heard, we do not see s 164's contrasting wording as indicative of interchangeability. Rather, we see it as indicative of deliberately differentiated drafting. It is unnecessary for us to enlarge further on the Judge's reasoning.

Conclusion

[141] While we agree with the High Court's conclusion as to the effect of the proviso in s 163, we consider the High Court erred in holding that s 163 did not apply to the acts or omissions of MAF personnel undertaking administrative responsibilities on behalf of the Minister at the pre-border stage. The answer to Issue 2(a) must therefore be "yes".

Issue 2(b): Did the High Court err in holding that s 163 of the Biosecurity Act 1993 applied to the acts or omissions of MAF personnel at the border clearance stage?

[142] It must follow from the preceding analysis under Issue 2(a) that the answer to Issue 2(b) is, in contrast, "no". We see no need to say anything further on this point.

---

142 High Court judgment, above n 2, at [1334]–[1354].

143 *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA) at 344–345 and 349–350, as further explained in *Minister of Fisheries v Pranfield Holdings Ltd* [2008] NZCA 216, [2008] 3 NZLR 649 at [118]–[121].

Issue 2(c): Did the High Court err in holding that the Crown cannot take the benefit of the immunity under s 163 (to the extent it applied to the acts or omissions of any MAF personnel) pursuant to s 6 of the Crown Proceedings Act 1950?

[143] We have found that s 163 affords an immunity against civil and criminal liability to third parties in favour of the MAF personnel said to have been in breach of a duty of care to the respondents.

[144] Consistent with the analysis of the majority in *Couch (No 2)* it follows that the proviso to s 6(1) of the Crown Proceedings Act applies here. Inasmuch as no cause of action can lie against the individual personnel responsible, nor can one lie against the Crown.

[145] Section 6(4) applies braces to the proviso's belt. We do not accept the suggestion by the Judge that s 6(4) applies to "officers" in a sense excluding servants.[144] The definition of "officer" in s 2(1) includes servants. The rationale for such a distinction, limiting the effect of s 6(4), is not evident, particularly given the overlap with the proviso to s 6(1). Nor would s 6(4A), referring to servants, be needed.

[146] It may also be observed, in closing this discussion, that s 6(4A) and (4B) limit the effect of two specific statutory immunities: s 86 of the State Sector Act and s 351 of the Food Act 2014. But, as we have shown earlier, they are two among many, and the others — notably s 163 which has been on the statute books for more than a quarter of a century — are not excepted.

Conclusion

[147] It follows that the answer to Issue 2(c) must also be "yes". We find that the High Court erred in holding that the Crown cannot take the benefit of the immunity under s 163 (to the extent it applied to the acts or omissions of any MAF personnel) pursuant to s 6 of the Crown Proceedings Act.

---

144 High Court judgment, above n 2, at [1373].

INTERMISSION

[148] The analysis thus far decides the appeal in favour of the Crown. In case this proceeding should be considered in another jurisdiction, we shall now analyse duty and breach as if Issue 2 had been answered in favour of the respondents.

[149] This cannot be done with brevity.

ISSUE 3: FIRST CAUSE OF ACTION — PRE-BORDER NEGLIGENCE

Overview

[150] The duty of care asserted in the High Court proceeded from the following broad contention:[145]

> At all material times, MAF and officers, agents and/or employees of MAF owed the plaintiffs a duty to exercise reasonable care and skill when undertaking their functions and responsibilities in relation to biosecurity in New Zealand including their functions under the Biosecurity Act 1993 or otherwise.

[151] Recognising that the pleading of a duty to exercise reasonable care when undertaking statutory functions and responsibilities might be construed as an allegation of a negligent breach of statutory duty, in his roadmap Mr Galbraith reformulated the duty as follows:

> Duty of care in respect to the consideration of and granting of the Kiwi Pollen application to import pollen from buds milled in China and apply to NZ kiwifruit orchards, and the clearance without inspection.

[152] In response to this Court's request for the revised pleading to address separately the conduct pre-border (the pre-border duty) and at importation (the border duty), a more detailed formulation was tendered. With reference to the pre-border functions it stated:

> MAF and MAF personnel owed a duty of care:
>
> (A) when assessing applications to import nursery stock, being unlimited volumes of kiwifruit pollen from China, obtained by macerating

[145] Amended statement of claim at [121].

flower buds and intended for pollination of New Zealand kiwifruit orchards, and in granting permits to import that nursery stock dated 16 April 2007 and 30 April 2009;

…

Particulars

1. The duty in (A) required:

   (a) assessing the permit applications against the acceptable level of risk, which was "negligible or less";

   (b) appropriate consideration of the high risk to New Zealand kiwifruit orchards from the bacteria Psa given the severe damage Psa was known to cause to kiwifruit vines with accompanying loss of production;

   (c) appropriate enquiry into and consideration of the process by which commercially milled pollen is produced, which includes macerating whole flower buds and inevitably results in plant parts other than pollen being included;

   (d) appropriate enquiry into and consideration of the likelihood of Psa being associated with commercially milled pollen;

   (e) appropriate application of MAF's Risk Analysis Procedures;

   (f) appropriate investigation and consideration of the particular risks associated with importation of commercially milled pollen from China;

   (g) appropriate investigation and consideration of the ability of the Chinese [National Plant Protection Organisation] to implement any necessary pre-export measures;

   (h) the use of procedures consistent with the Importation of Nursery Stock Import Health Standard and schedules applying to kiwifruit nursery stock;

   (i) the inclusion of measures/conditions of entry appropriate to the high level of risk;

   (j) appropriate consultation with the kiwifruit industry as required by s 22 of the Biosecurity Act, the Risk Analysis Procedures and MAF's policy statement on consultation.

[153] Hence in relation to the pre-border functions the pre-border duty was confined to the conduct involving the grant of the first import permit to Kiwi Pollen on 16 April 2007 and the so-called renewal of the permit on 30 April 2009. The reformulated duty echoed the three processes prescribed in s 22:[146] risk assessment, management of risk by appropriate entry conditions, and consultation.

Statutory context

[154] This is a case where the relationship between the parties derives from the statutory framework. As Tipping J observed in *North Shore City Council v Attorney-General (The Grange)*, in those circumstances the existence and ambit of any common law duty of care is profoundly influenced by that framework.[147]

The evolution of s 22 of the Biosecurity Act 1993

[155] Prior to the commencement of the Act on 1 October 1993 the importation of plant material into New Zealand was regulated by the Introduction and Quarantine of Plants Regulations 1973, made pursuant to the Plants Act 1970. Special requirements in relation to "nursery stock"[148] were specified in reg 29, including obtaining a permit to import from the Director-General.

[156] The Act in its original form made provision for the Director-General to issue import health permits for the importation of risk goods from any country.[149] The criteria to which the Director-General was to have regard were prescribed[150] and no import health permit could be issued unless an IHS[151] issued under s 22 was in

---

146 See below at [158].

147 *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 [*The Grange*] at [224].

148 Defined in the Introduction and Quarantine of Plants Regulations 1973, reg 2(1) as meaning "propagative material of any kind or species of plant and includes any vegetable to be used for propagation; but does not include any vegetable for consumption, fruit, or seed, or the bulb, corm, rhizome, or tuber of any ornamental plant, that is in a dormant state".

149 Biosecurity Act, s 20 (repealed as from 26 November 1997 by the Biosecurity Amendment Act 1997, s 12(b)).

150 Section 21(2) (repealed as from 26 November 1997 by the Biosecurity Amendment Act, s 12(b)).

151 Defined in s 2(1) as "a statement approved under section 22(1) of [the] Act by a chief technical officer of the conditions that must, if an import is to be made, be met in the country of origin or export, during transit, during importation and quarantine, and after introduction".

force in respect of the relevant risk goods.[152] In the absence of an exemption[153] or a regulation permitting importation without an import health permit, a biosecurity clearance could not be granted in respect of risk goods unless an inspector was satisfied that an import health permit was in force in respect of the goods and that they complied with the requirements of both the permit and the associated IHS.[154]

[157] It appears that difficulties were experienced in the implementation of aspects of the statutory requirements, some of which were highlighted in the judgment on review in *New Zealand Asparagus Council v Director-General of Agriculture and Fisheries*.[155] Various inadequacies were sought to be overcome by the Biosecurity Amendment Bill (No 4) 1996.[156] In its report back the Primary Production Committee relevantly stated:[157]

> **Repeal of provisions relating to import health permits**
>
> Clause 12 repeals the provisions in the Act relating to import health permits. Under the current Act, import health permits set out requirements that must be met before goods can be given biosecurity clearance. This duplicates the function performed by import health standards. …
>
> …
>
> **Import health standards**
>
> Clause 13 repeals section 22 of the Act which provides for import health standards and substitutes new section 22 which more clearly defines the nature and purpose of an import health standard. …

---

152 In November 1993 the first IHS was issued in respect of the importation of nursery stock described as "NASS Standard 155.02.06". Consistent with the mandatory requirement for an import health permit, the Basic Entry Conditions for nursery stock stipulated that a permit to import was required. In respect of pollen, the document stated that "[a] prior permit to import must be obtained from the Permit Officer, MAF Lynfield".

153 Biosecurity Act, s 24.

154 Section 27(a).

155 *New Zealand Asparagus Council v Director-General of Agriculture and Fisheries* HC Wellington CP103/95, 20 June 1995, referred to in (19 December 1995) 552 NZPD 10887. Among other things the Court held that no import health permit had been issued in respect of the actual or prospective importation of asparagus since the Act came into force, meaning the approvals for importation purportedly given by MAF had no statutory basis. However the Court rejected the contention that there was either an express or implied obligation in the Act to consult on the issue of permits or standards.

156 Biosecurity Amendment Bill (No 4) 1996 (216-1). The general policy statement included reference to the fact that Ministry of Agriculture inspectors had identified inadequacies of the Act for implementing some aspects of the border control of imported goods.

157 Biosecurity Amendment Bill (No 4) 1996 (216-2) (select committee report) at viii–ix (emphasis added).

> These amendments clarify a confusing situation under the current Act. While section 22 provides for import health standards, the section does not list the matters that need to be taken into account when a standard is developed. These matters are instead listed in the section relating to import health permits (which are issued only if an import health standard exists). *This leads to the incorrect interpretation that the focus of the risk assessment is during the permitting process rather than in the standard setting process.*

[158] The new s 22 specified the object of an IHS, the matters to which regard was to be had in the making of a recommendation and provided for consultation. Relevantly it provided:

> **22 Import health standards**
>
> (1) The Director-General may, following the recommendation of a chief technical officer, issue an import health standard specifying the requirements to be met for the effective management of risks associated with the importation of risk goods before those goods may be imported, moved from a biosecurity control area or a transitional facility, or given a biosecurity clearance; and may, in a like manner, amend or revoke any import health standard so issued.
>
> (2) If an import health standard requires a permit to be obtained from the Director-General before the goods can be imported, moved from a biosecurity control area or a transitional facility, or given a biosecurity clearance, the Director-General may, if he or she thinks fit, issue the permit.
>
> (3) Nothing in this Act obliges the Director-General to have an import health standard in force for goods of any kind or description if, in the Director-General's opinion, the requirements that could be imposed on the importation of those goods would not be sufficient to enable the purpose of this Part to be met if the importation of those goods were permitted.
>
> (4) An import health standard issued under this section may apply to goods of a certain kind or description imported from—
>
> (a) A country or countries specified in the import health standard; or
>
> (b) Countries of a kind or description specified in the import health standard; or
>
> (c) All countries; or
>
> (d) A location or locations specified in the import health standard.
>
> (5) When making a recommendation to the Director-General in accordance with this section, the chief technical officer must have regard to the following matters:
>
> (a) The likelihood that goods of the kind or description to be specified in the import health standard may bring organisms into New Zealand:

(b) The nature and possible effect on people, the New Zealand environment, and the New Zealand economy of any organisms that goods of the kind or description specified in the import health standard may bring into New Zealand:

(c) New Zealand's international obligations:

(d) Such other matters as the chief technical officer considers relevant to the purpose of this Part.

(6) Before making a recommendation to the Director-General on the issue or amendment of an import health standard, the chief technical officer must, unless the standard needs to be issued or amended urgently, or unless the chief technical officer considers that the amendment is minor, consult with those persons considered by the chief technical officer to be representative of the classes of persons having an interest in the standard.

(7) The consultation may be on the import health standard or on a document that analyses or assesses the risks associated with the goods or class of goods to which the goods belong.

(8) Before making a recommendation to the Director-General in accordance with this section the chief technical officer must give notice of the intention to make the recommendation to the chief executive of every department of State whose responsibilities for natural resources or human health may be adversely affected by the issue, amendment, or revocation of the relevant standard.

…

[159] Section 27(a) was correspondingly amended to state that a biosecurity clearance could not be given for risk goods unless the inspector was satisfied:

(a) That the goods comply with the requirements specified in an import health standard in force for the goods (or goods of the kind or description to which the goods belong); …

The alleged duty in the statutory context

[160] As already noted, the reformulated duty of care in respect of the assessment of applications for and the grant of import permits echoes the processes prescribed in s 22 of the Act:[158]

(a) assessment of risk associated with importation: (a)–(g);

(b) management of such risk by appropriate conditions of entry: (h)–(i); and

[158] See the reformulated allegation above at [152].

(c) consultation with the industry: (j).

[161] The High Court treated the import permit process in respect of pollen as a postponement or deferral of the s 22 functions, including consultation, stating:[159]

> [368] A duty to carry out non-negligent risk assessments (before approval to import risk goods is given or when there has been an outbreak of a disease in a country which exported goods to New Zealand) does not conflict with other duties under the Act. Rather, the duty marches "hand-in-hand" with the Act's purpose of effectively managing the risks associated with the importation of risk goods, New Zealand's ability to set its own appetite for risk and its obligation to make its decisions on the basis of science. It is consistent with the delegated legislation (the IHS for nursery stock) which postponed the required risk assessment for pollen imports until an application for a permit was made.
>
> …
>
> [814] Dr Butcher was explaining that consultation was necessary at some point in the process.[160] As the IHS simply referred to the need to obtain a permit, the first permit for a pollen import should have triggered consultation. That evidence is consistent with s 22(6) of the Biosecurity Act which required consultation before the chief technical officer recommended that the Director-General adopt an IHS. This aspect of the Nursery Stock IHS effectively had been postponed in relation to pollen. Dr Butcher's evidence was also consistent with MAF's Risk Analysis Procedures.
>
> (footnote omitted)

[162] This is perhaps unsurprising given the apparent unanimity of the parties below as to the implications of the singular pollen clause in the Nursery Stock IHS. For example one of the respondents' experts deposed:

> By including the single statement that, "*A prior Import Permit must be obtained from the Permit Officer*", the IHS for Nursery Stock effectively deferred the requirement for an analysis of the risks associated with importation of pollen to such time as a request for access was received and an Import Permit required and, by extension, deferred the requirement for consultation.

---

159 We recite [368] in its entirety in order to place the relevant final sentence in context. Earlier the Judge had described the effect of cl 2.2.3 to be to leave import conditions for assessment at the time that an application to import pollen was received: High Court judgment, above n 2, at [211].

160 Dr Butcher was the manager of the Plant Imports and Exports Group at MAF, responsible for decisions about imports and exports of plans and plant products, including nursery stock and fruit.

[163] The rationale for the use of such a provision was explained by Dr Butcher for the Crown:

> Generally, nursery stock can only be imported where an import permit has been issued under the Nursery Stock IHS (see paragraph 2.2.1.2 under the Basic Conditions section of the Nursery Stock IHS) … The reason we issue import permits rather than putting all the rules for every consignment in the IHS, is that you cannot predict what every request might be. We use the permits in order to address the flexibility and variation in the requests we get. Permits also allow the latest information on pests to be included, or measures to be applied.

[164] However in this Court Mr Hodder submits that, contrary to the finding that consultation was "deferred", it was not MAF practice in 2006–2007 to consult on import permits and it was not practicable to do so. He explains that MAF's policy statement on consultation was a high-level policy statement which was intended to be implemented by the different groups across the whole of MAF according to their practices.

[165] On the other hand, while acknowledging, at least implicitly, an obligation to undertake a risk analysis at the permit application stage (the scope of which is said to be circumstances dependent), Mr Hodder submits that the pollen import permits in issue reflect the formulation of a revised policy in relation to the operation of the regulatory regime. The essence of the appeal, he contends, is that the High Court had erroneously converted public law responsibilities under the Act into a private law duty of care.

[166] Consequently, before addressing the issue of proximity we will first discuss the Crown's contention that the respondents' claims are not justiciable.

Justiciability

[167] As Professor Todd observes, the principles of negligence must operate consistently with the doctrine of the separation of powers.[161] Todd explains this consideration underlies some well-known decisions that seek to distinguish between complaints against public bodies about the broad merits of a decision made in the

---

[161] Todd, above n 98, at 175.

exercise of a statutory power, and complaints about the manner in which a discretionary decision has been implemented in practice:[162]

> No duty is owed as regards the former, "policy" matters, because the decision to be made is one for the public body, not the courts. But a duty may be owed in respect of "operational" matters, for the court asks only whether the policy has been implemented with care. However, drawing the distinction is difficult, and more recent decisions tend to focus on the question whether a decision is justiciable, or is essentially of a political character. In these ways the courts seek to draw a line between their own role in determining private disputes and the policy or political role of other branches of government.

[168] The proposition that the impugned pre-border conduct is not justiciable was at the forefront of the Crown's attack on the duty finding. Contending that the decision not to include a condition requiring pollination in a PEQ facility was a change in pollen import policy involving both delegated legislation and regulatory decisions, Mr Hodder challenges the duty finding for failing to apply what he describes as two important points of principle:

(a) law making cannot be subject to a duty of care; and

(b) border control cannot be subject to a duty of care.[163]

[169] The judgment is criticised for failing to address the first point at all and as being erroneous on the second in concluding that the asserted duty of care did not involve adjudication on public policy and political considerations.

Law making cannot be subject to a duty of care

[170] The Crown perceived the crux of the respondents' case to be that MAF personnel ought to have created better delegated legislation in the form of the Nursery Stock IHS, which would have prohibited the importation of kiwifruit pollen or put in place further restrictions or requirements on such imports.

---

[162] At 175 (footnote omitted).

[163] In written submissions this was described as the principle that the common law has consistently rejected a duty of care on public regulators but in oral argument developed as being the border control functions do not attract a duty of care.

[171] It is fair to say that the Crown's depiction of the crux of the respondents' case could find justification in the pleadings as they stood in the High Court (and in thisCourt until the reformulation in the course of Mr Galbraith's address). Not only was it asserted that a duty was owed to the respondents to exercise reasonable care when processing, considering and approving import permits, but also that there was an equivalent duty when issuing, amending or revoking an IHS. However, that latter assertion did not appear in the reformulated pleading, it being the respondents' argument that the case concerns negligent assessment and implementation of policies to manage risk, not an allegation of negligence in relation to the exercise of a legislative or quasi-legislative power. The decision to grant a specific permit is said to be a quintessentially operational decision.

[172] Nevertheless, proceeding from the premise that an IHS is delegated legislation and immune from suit, Mr Hodder contends that import permits, while different to IHSs in being granted in respect of particular imports, involve substantive decision-making as to what may be imported into New Zealand. He submits that they are closer to policy and legislative powers than to the powers of, for example, a building inspector, being the comparator adopted in *Holtslag v Alberta* in respect of a decision to issue a product listing approving the use of untreated "pine shakes" (a building material).[164]

[173] Mr Hodder contends that not only an IHS but also import permits issued under an IHS have the force of law. As he puts it:

> … the issue of import permits involved regulatory judgments; and the development and application of general rules having the force of law, in essence quasi-legislation.

[174] We do not accept that submission. The assessment of risk associated with the importation of risk goods and the formulation of requirements to provide effective management of such risks is not an activity which is inherently legislative in nature. When such activities are undertaken in the statutory context of the promulgation of an IHS, it was common ground both below and in this Court that they are immune

---

[164] *Holtslag v Alberta* 2006 ABCA 51, (2006) 265 DLR (4th) 518 at [31].

from suit as in effect constituting delegated legislation.[165] However that immune status flows not from the nature of the activities themselves but from the statutory process prescribed in s 22. We consider that the statutory power is exhausted once the IHS has been promulgated. Downstream steps such as the grant of import permits, while envisaged by the IHS, are not part of or an extension of the s 22 jurisdiction.

Border control cannot be subject to a duty of care

[175] At first instance the Crown submitted that the respondents' negligence claim invited the Court to adjudicate on an alleged failure by the Executive to protect the national border which would require the Court to make a determination as to the correct public policy or political decisions to be made, including the level and manner of resourcing.

[176] Addressing this argument the Judge said:

> [355] These submissions concern the justiciability of the pleaded duty. That is, if a duty of care were imposed, the contention is that it would involve the Court trespassing into discretionary decisions on the allocation of scarce resources and this is not an appropriate role for a Judge. I do not accept this submission. In contrast with, for example, *George v Newfoundland and Labrador*, the causes of action do not challenge MAF's strategy and approach for dealing with risk goods. This is not a claim for institutional negligence. The causes of action concern alleged negligence in carrying out the processes which MAF had in place. This is similar to the inspector in *Givskud* who was carrying out his duties under the Government's policy. The plaintiffs consider that, had MAF carried out its processes non-negligently, measures would have been imposed on commercial pollen imports on the basis of science, in accordance with the Act and the SPS agreement.
>
> [356] This means that imposing a duty of care does not require the Court to make any judgment about how the border is to be protected and the level of resources necessary to protect the border. It does not intrude upon the public policy and political considerations about that. The issue for the Court is whether MAF personnel were negligent in carrying out the risk assessment of a permit application which the Act and MAF's procedures required, or were negligent when assessing whether the consignment complied with the requirements specified in the relevant IHS or whether it would be unwise to rely on the accompanying documentation as required by the Act and MAF's procedures.
>
> (footnotes omitted)

---

[165] High Court judgment, above n 2, at [334(c)] and [368]. The respondents' submission in this Court categorised an IHS as a legislative instrument.

[177] Mr Hodder challenges those conclusions. Commencing with the proposition that the adjudicated breaches all relate to the grant of import permits for kiwifruit pollen without a full risk assessment taking place, such as would be required were a new IHS to be created, two points are made:

(a) The decision to commission the PHEL Review was part of a wider policy to find new, more efficient ways of importing germplasm, including pollen, into New Zealand for breeding purposes to meet demand.

(b) Demand for IHSs has always outstripped supply, there being hundreds of outstanding requests.[166] The process is complex and requires particular types of human resources. In the relevant period the prioritisation of such requests was decided by a panel comprising representatives from MAF, the Ministry of Foreign Affairs and Trade, and the Biosecurity Council.

[178] The Crown submits that, because of such resourcing constraints, MAF used a triaging process and a "moderated risk analysis procedure" to deal with import permits. A decision was made about how to allocate scarce resources to particular risks "which resulted in less scrutiny of import permits than IHSs".

[179] From that footing Mr Hodder advances two principal submissions critical of the Judge's finding of "process errors". He first submits that such a finding amounted to a collateral attack on the strategy (and resources) used by MAF personnel to manage biosecurity risks. It is said that in order to avoid alleged breaches in the future the strategy must be changed and a "formal" risk analysis must be undertaken in every circumstance. For every import request importers must be questioned about what they are importing and the potential for any contaminants.

[180] So far as the clearance process is concerned, he submits that MAF personnel must be able to rely on statements provided by importers and by overseas National Plant Protection Organisations (NPPOs) in order for the system as a whole

---

[166] See above at [54].

to operate. The implications of the judgment are said to be that MAF personnel may have to question formal declarations and certifications provided by overseas NPPOs, all in the context of huge volumes of goods coming across New Zealand's border and the limited resources available.

[181] Secondly, and in Mr Hodder's submission perhaps most importantly, the standard of care imposed by the judgment with which to measure the process errors is said to be incompatible with New Zealand's political decision to commit to the SPS Agreement's scientific standard. Under New Zealand's international obligations a "measure" may not be imposed on a good unless it can be justified by science. In the absence of scientific justification for measures, the good must be let in. The Crown contends that the effect of the judgment is to reverse this standard so that MAF personnel will be considered negligent if they allow a good into New Zealand that cannot be established with positive scientific evidence to be safe.

[182] The Crown's final point is that the national border is the defining feature of the political and legal authority of a nation state[167] and the nature of border control decisions is not one for which there is an appropriate legal yardstick.

[183] The respondents' primary rejoinder reiterates the submission that the impugned conduct occurred at an "operational" level. They contend that the Crown erroneously characterises the High Court's finding of operational or process failures as involving a collateral attack on MAF's strategy and resourcing. Rather the judgment (and their case) took MAF's strategy and resourcing as a given and identified errors in the operational implementation of those policies by MAF and its personnel.

[184] In *Robinson v Chief Constable of West Yorkshire Police* Lord Reed was critical of *Anns v Merton London Borough Council* for its importation of public law concepts and the American distinction between policy and operational decisions into questions concerning duties arising under the law of obligations.[168] However we share the view

---

[167] Referring to Andrew Ladley and Nicola White *Conceptualising the Border* (Institute of Policy Studies, Wellington, 2006) at 1–2.

[168] *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 at [38], citing *Anns v Merton London Borough Council* [1978] AC 728 (HL).

in *Todd on Torts* that the distinction may retain relevance in the context of a question of justiciability:[169]

> However, while we can agree that public law concepts should be rejected, arguably there remains room for the policy/operational inquiry as informing the inquiry into the issue of justiciability. His Lordship went on to recognise that a public authority's non-liability in omissions cases could be justified on the application of the general principles of negligence, and that in other cases policy considerations could have a role to play in determining whether recognition of a duty would be just and reasonable. Seemingly, determining whether the question before the court is justiciable may sometimes be needed as part of this inquiry.

[185] The challenging nature of the task in drawing the line between policy and operational decisions was highlighted in *George v Newfoundland and Labrador*:[170]

> [154] The question of what constitutes a policy decision protected from negligence liability is a difficult one. Governmental policy decisions are not justiciable and cannot give rise to tort liability. But governments may attract liability in tort where government agents are negligent in carrying out prescribed duties or policies.

[186] However in our view the challenge to the justiciability of decisions concerning the importation of risk goods was essentially resolved so far as pollen was concerned by the decision to include it in the Nursery Stock IHS. As earlier noted difficulties arose from the economical fashion in which pollen was addressed in that IHS, which led MAF personnel to the view that they had the power to determine whether a PEQ condition was required. But as we have explained, in our view the requirement for a minimum three month PEQ period was mandatory pursuant to cl 2.2.1.12. MAF personnel had no discretion to dispense with that requirement.[171] Perhaps because pollen importations were unusual, the ability to impose additional conditions was left for determination on a case-by-case basis. However that did not have the effect of according decisions about additional conditions the status of government policy.

[187] In the context of the law-making issue, the Judge recognised the conflicting interests that may be at stake where a decision is made on the import of risk goods but

---

169 Todd, above n 98, at 356.
170 *George v Newfoundland and Labrador* 2016 NLCA 24, (2016) 399 DLR (4th) 440.
171 See above at [63].

noted that differences in views about the acceptable level of risk were resolved by New Zealand's "appropriate level of protection" setting under the SPS Agreement and the agreed requirement for restrictive measures to be justifiable on the basis of science.[172] She then observed:

> [365] Moreover, MAF was structured to avoid conflicts of this kind in decisions on risk goods. Barry O'Neil, the head of Biosecurity New Zealand at the relevant time, gave evidence that risk analysis was separate from the IHS team for good practice reasons. Risk assessors did the risk assessment of the organism. This was purely a technical decision. The IHS team addressed the measures to mitigate the risk to enable the goods to be imported. The operational staff were given guidance on New Zealand's [appropriate level of protection] through documents such as MAF's 2006 Risk Assessment Procedures. There was no political interference in these decisions under the Biosecurity Act.
>
> (footnote omitted)

[188] The functional separation there described appears to relate to the IHS process itself and did not specifically contemplate the postponement of the risk analysis to the downstream permit stage. Nevertheless the point remains valid that the risk assessment of an organism is a "technical decision", as the Judge observed, which we take to mean one determined by reference to the organism's profile and potential effects, unrelated to economic or political considerations. The Judge was correct in her observation that such decisions do not involve public policy and political considerations.

[189] Whether conditions additional to (but not inconsistent with) those specified in the IHS are required in relation to a particular proposed importation is an operational decision to be made in the context of the import permit application. Like the Judge we reject the proposition that recognition of a duty of care in relation to the performance of those functions should be precluded on account of public policy or political considerations associated with the protection of the national border.

---

[172] High Court judgment, above n 2, at [363]–[364]. Under the SPS Agreement, governments retain the right to determine their appropriate level of risk to human, animal and plant life and health (referred to as the Government's "appropriate level of protection"): SPS Agreement, above n 9, preamble.

[190] In *The Grange* Blanchard J commented that a difficulty with a staged formulation for the recognition of a duty of care in novel situations is that some matters may be relevantly assessed at either stage or may even need to be examined at both. They cannot always be pigeonholed into one or the other.[173] That observation, apt in respect of the widely ranging submissions summarised above, is reflected in the fact that the resourcing implications of the recognition of the challenged duty is a matter which we revisit when we address the final stage of policy in the sense of "externalities"[174] as distinct from government policy.

Conclusion on justiciability

[191] We would have rejected the Crown's argument that the courts are precluded from entertaining claims of a breach of a duty of care on the part of MAF personnel either on the basis of asserted law-making or border control. We turn to consider whether such a duty should have been recognised.

Issue 3(a): Did the High Court err in finding that MAF personnel owed a duty of care to Strathboss and some members of the Strathboss class to take reasonable skill and care in their actions or omissions prior to the New Zealand Psa3 incursion to avoid physical damage to property, and to take care to avoid loss consequential on that damage to property?

Relevant principles

[192] The role of the concept of a duty of care in the law of negligence is to delineate the circumstances in which a careless act or omission which causes damage will be actionable. A duty of care will exist where the relationship between an actor A and a party B who sustains a loss is such that the law imposes upon A a duty to take care to avoid or prevent such loss.[175]

[193] While negligence claims are habitually analysed compartmentally,[176] the critical question is a composite one, whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind the claimant claims

---

173 *The Grange*, above n 147, at [149].
174 At [156].
175 *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) at 486 per Lord Oliver.
176 Whether there was (a) a duty of care, (b) breach of that duty, and (c) damage caused by the breach of duty.

to have suffered.[177] Hence it is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harm.[178] Furthermore, while it is conventional to examine the duty of care question without reference to breach, as the majority in *Couch v Attorney-General (Couch (No 1))* observed sometimes the nature of the breach can be relevant to the scope of the duty.[179]

[194] Lord Steyn observed in *Gorringe v Calderdale Metropolitan Borough Council* that the subject of negligence and statutory duties and powers is one of great complexity and an evolving area of the law. He described it as a subject on which an intense focus on the particular facts and on the particular statutory background, seen in the context of the social welfare state, is necessary.[180]

[195] As originally pleaded the duty of care which the respondents asserted was owed to them was a duty by MAF personnel to exercise reasonable care and skill when undertaking their functions and responsibilities under the Act. As refined in the course of argument,[181] the primary pre-border duty claimed is an obligation to undertake a risk assessment before issuing an import permit in respect of pollen which was intended for use, not for breeding, but for a new purpose, the commercial pollination of orchards by spraying.

[196] The New Zealand courts had not previously ruled on the existence of such a duty. It was common ground below that the claim fell to be determined by reference to the principles governing the recognition of novel duties of care explained by the Supreme Court in *The Grange*.[182] While recognising that New Zealand courts, like those in other common law jurisdictions, have struggled to formulate an entirely

---

177 *Calvert v William Hill Credit Ltd* [2008] EWCA Civ 1427, [2009] Ch 330 at [45]. Indeed in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) at 1052, Lord Pearson suggested that it may be artificial and unhelpful to consider the question as to the existence of a duty of care in isolation from the elements of breach of duty and damage, a passage noted by Cooke P in *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA) at 520.

178 *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) at 627 per Lord Bridge.

179 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 [*Couch (No 1)*] at [83].

180 *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057 at [2], cited in the High Court judgment, above n 2, at [284] before the Judge turned to consider examples which might provide guidance by analogy at [286]–[326].

181 See above at [150]–[153].

182 *The Grange*, above n 147.

satisfactory methodology,[183] the Supreme Court there elaborated on the staged inquiry comprising foreseeability of harm, proximity of relationship and policy considerations.

[197] The Supreme Court in *The Grange* considered that foreseeability is at best a screening mechanism to exclude claims that must obviously fail because no reasonable person in the shoes of the defendant would have foreseen the loss. The law regards the loss as such an unlikely result of a defendant's act or omission that it would not be fair to impose liability.[184] Blanchard J[185] elaborated on the further stages in this way:[186]

> [158] Assuming foreseeability is established in a novel situation, the court must then address the more difficult question of whether the foreseeable loss occurred within a relationship that was sufficiently proximate. This is usually the hardest part of the inquiry, for as Lord Bingham said in *Customs and Excise Commissioners v Barclays Bank plc*, the concept of proximity is "notoriously elusive". He was speaking of claims for economic loss but, in New Zealand at least, because of our no-fault accident compensation scheme, the majority of novel claims are of this character and those that are not will be sufficiently unusual as to raise comparable difficulties. Lord Oliver said in *Alcock v Chief Constable of South Yorkshire* that the concept of proximity is an artificial one which depends more on the court's perception of what is a reasonable area for the imposition of liability than upon any logical process of analogical deduction. An examination of proximity requires the court to consider the closeness of the connection between the parties. It is, to paraphrase Professor Todd, a means of identifying whether the defendant was someone most appropriately placed to take care in the avoidance of damage to the plaintiff.
>
> [159] Richardson J has observed that the concept of proximity enables the balancing of the moral claims of the parties: the plaintiff's claim for compensation for avoidable harm and the defendant's claim to be protected from an undue burden of legal responsibility. A particular concern will be whether a finding of liability will create disproportion between the defendant's carelessness and the actual form of loss suffered by the plaintiff. Another concern is whether it will expose the defendant and others in the position of the defendant to an indeterminate liability. The latter consideration may, however, be better examined at the second stage of the inquiry: whether the finding of a duty of care will lead to similar claims from other persons who have suffered, or will in the future suffer, losses of the same kind, but who may not presently be able to be identified.

---

183 At [147].

184 At [157].

185 Delivering the reasons of himself, McGrath and William Young JJ.

186 In the High Court the Crown did not contest, and the Judge accepted, the respondents' contention that they readily passed that screening mechanism: High Court judgment, above n 2, at [348].

> [160] In a relatively small number of cases, at the final stage of the inquiry the court will find no duty of care exists notwithstanding that the loss was foreseeable and the relationship sufficiently proximate. It will do so because a factor or factors external to that relationship (perhaps indeterminate liability) would make it not fair, just and reasonable to impose the claimed duty of care on the defendant. At this last stage of the inquiry the court looks beyond the parties and assesses any wider effects of its decision on society and on the law generally. Issues such as the capacity of each party to insure against the liability, the likely behaviour of other potential defendants in reaction to the decision, and the consistency of imposition of liability with the legal system more generally may arise.
>
> (footnotes omitted)

[198] Blanchard J noted that the courts generally approach claims about allegedly tortious omissions with more caution than they do acts taken by a defendant, citing *Dorset Yacht* and *Couch (No 1)*.[187] In the latter Tipping J for the majority observed that the law has traditionally been cautious about imposing a duty of care in cases of omission as opposed to commission, in cases where a public authority is performing a role for the benefit of the community as a whole, and in cases where it is the actions of a third party rather than those of the defendant that are the immediate cause of the loss or harm suffered by the plaintiff.[188]

[199] Nevertheless the general principle, as Elias CJ explained in *The Grange*, is that public authorities are liable when they cause harm to others on the same basis as private individuals are liable (except where such liability would be inconsistent with the statutory scheme).[189] A number of recent judgments of the United Kingdom Supreme Court have emphasised the converse proposition that, like private individuals and bodies, public authorities generally have no duty of care to prevent the occurrence of harm, the reason being that the common law does not generally impose liability for pure omissions. In *Robinson v Chief Constable of West Yorkshire Police* Lord Reed drew attention to the following summary of the "omissions principle" by Tofaris and Steel, in their article "Negligence Liability for Omissions and the Police":[190]

---

187 *The Grange*, above n 147, at [167], n 223, citing *Home Office v Dorset Yacht Co Ltd*, above n 177, at 1060; and *Couch (No 1)*, above n 179, at [80].

188 *Couch (No 1)*, above n 179, at [80].

189 *The Grange*, above n 147, at [27].

190 *Robinson v Chief Constable of West Yorkshire Police*, above n 168, at [34], citing Stelios Tofaris and Sandy Steel "Negligence Liability for Omissions and the Police" (2016) 75 CLJ 128 at 128 (footnote omitted).

> In the tort of negligence, a person *A* is not under a duty to take care to prevent harm occurring to person *B* through a source of danger not created by *A* unless (i) *A* has assumed a responsibility to protect *B* from that danger, (ii) *A* has done something which prevents another from protecting *B* from that danger, (iii) *A* has a special level of control over that source of danger, or (iv) *A*'s status creates an obligation to protect *B* from that danger.

[200] These principles have most recently been considered by the United Kingdom Supreme Court in *N v Poole Borough Council* where Lord Reed (for the Court) summarised the position in this way:[191]

> [65] It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2) that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation.

Proximity

[201] Although finding that all the respondents passed the screening mechanism of foreseeability,[192] the Judge considered that it was possible to distinguish between the various layers of the kiwifruit industry.[193] Defining the term "property rights" to cover all those who may have a sufficiently direct or closely associated interest in the vines or crop that the law will recognise, the Judge concluded that:

> [429] For these reasons I consider the alleged duty of care under the first cause of action is supported by the New Zealand cases in relation to those who had "property rights" in the kiwifruit vines or crops affected by Psa3 (either because they were infected or because they were at risk of infection and were therefore treated as though they were infected). I consider the alleged duty of care under the first cause of action is not supported by the New Zealand cases for those who did not have "property rights" in the kiwifruit vines or crops affected by Psa3. …

---

191 *N v Poole Borough Council* [2019] UKSC 25, [2019] 2 WLR 1478.
192 High Court judgment, above n 2, at [348].
193 At [408].

[202] Hence the Judge ruled that proximity was established as between MAF and those in the Strathboss class (including Strathboss itself) who had "property rights" in the kiwifruit vines and their crops who were or were likely to be infected by Psa3 (or who were treated as though they were infected) but not in relation to Seeka in its capacity as a PHO.[194]

[203] The finding of proximity between MAF personnel and the relevant kiwifruit growers is challenged on four grounds:

(a) the Act is inconsistent with the imposition of a duty of care;

(b) the proximity analysis failed to consider whether a close and direct legal relationship existed between any member of MAF personnel and the respondents — no close and direct legal relationship existed;

(c) MAF personnel were neither the direct cause, nor the primary source, of the alleged harm; and

(d) the circumstances in which proximity might be arguable at trial, where a third party has caused harm (as explained in *Couch (No 1)*), did not exist in this case.

Is the Biosecurity Act 1993 inconsistent with the imposition of a duty of care?

[204] Mr Hodder first submits that the statutory context is incompatible with the alleged duty of care because the Act's objectives are to benefit the widest concepts of the public good, there is no provision in the Act that shows that one of its purposes is to protect an individual or class of individuals from a particular risk, and Parliament did not legislate for a "zero-risk" system, instead the focus being on effectively managing risks.[195] He submits that the objective of protecting the widest notions of the public good, together with the system of managing (not precluding) risk,

---

194 At [434].

195 Contrast is drawn with the statutory language of the Hazardous Substances and New Organisms Act, which explicitly adopts the precautionary approach. Attention is drawn to *National Beekeepers' Assoc of New Zealand v Chief Executive of the Ministry of Agriculture and Forestry* [2007] NZCA 556 at [29] and [50].

creates significant scope for MAF personnel to have conflicting duties which must be balanced, rather than owing duties to any one set of individuals.

[205] Mr Hodder then submits that the express (and detailed) provision in the Act for certain types of compensation indicates that compensatory damages in negligence are not contemplated. He takes issue with the High Court's finding that s 162A does not say anything about whether there is a private law remedy for loss suffered due to acts or omissions of MAF or MAF personnel, submitting that s 162A(4)(b) excludes compensation "[i]n respect of a loss suffered before the time when the exercise of the powers commenced". As the obvious loss which would occur before response powers were exercised is the loss caused by the actual incursion itself, it follows that s 162A is a statutory exclusion addressed, in part, to taxpayer compensation for the type of loss alleged in this case.

[206] Mr Hodder suggests that the judgment seemed to start from the position that a private law duty of care should be owed unless the statute says otherwise, focusing in particular upon [373] of the judgment:

> [373] This means that, although the Biosecurity Act has broad scope and responsibilities aimed at the general public good, that does not exclude a private law duty. It depends on whether circumstances have arisen which give rise to proximity between MAF's actions or inactions and an individual or identifiable and sufficiently delineated class.

He submits that was the wrong approach: rather, in order to establish that an individual exercising statutory functions has a private law duty of care, the statute itself must provide positive evidence for the duty of care.

[207] Precisely what was contemplated by "positive evidence" for the existence of a duty of care in the statute itself was not developed in argument. However, if it was intended to convey that as a prerequisite to the recognition of a duty of care the statute must contain a specific indicator of the existence of a duty, such as in the Building Act 2004, we are unable to agree. Such a view would place an unnecessary gloss on the current approach as reflected in the observations of Tipping J and the minority in *Couch (No 1)* referred to above.[196]

---

[196] See *Couch (No 1)*, above n 179, at [53], [55] and [111].

[208] Nor do we consider that the propositions at [373] are fairly susceptible to criticism, certainly when read in the context of related paragraphs in the judgment.[197] [373] must be viewed against the backdrop of the Judge's discussion of the principles relating to public authorities, in particular at [265]. Specific reference is there made to Lord Steyn's statement in *Gorringe*:[198]

> [A]gainst the background of a statutory duty or power, a basic question is whether the statute *excludes* a private law remedy?

The Judge's adoption of that approach was not in error. Her consideration of the compensation provisions in that light was appropriate.

[209] Turning to Mr Hodder's second submission, the Act as originally enacted contained a number of provisions relating to compensation (ss 76(i)–(j) and 86 (in pt V, Pest Management) and ss 149, 150(3)(c), (d) and (e) and 153 (in pt VII, Exigency Actions)) and one prohibition on the payment of compensation in s 127(3) (in the Administration Provisions, pt VI). The issue of compensation was revisited in the Biosecurity Amendment Act 1997 which inter alia introduced s 162A (into the Miscellaneous Provisions in pt IX) and repealed s 127(3).

[210] Section 162A stated:[199]

> **162A Compensation**
>
> (1) Where—
>
> (a) Powers under this Act are exercised for the purpose of the management or eradication of any organism; and
>
> (b) The exercise of those powers causes verifiable loss as a result of—
>
> (i) The damage to or destruction of a person's property; or
>
> (ii) Restrictions, imposed in accordance with Part 6 or Part 7, on the movement or disposal of a person's goods,—
>
> that person is entitled to compensation for that loss.
>
> (2) The compensation payable under this section must be of such an amount that the person to whom it is paid will be in no better or

---

197 See also High Court judgment, above n 2, at [441], where the Judge observed that the question is not whether an intention can be gathered to create a private law remedy from the statutory provisions and structure but whether the statute excludes a private law remedy.

198 *Gorringe v Calderdale Metropolitan Borough Council*, above n 180, at [3].

199 This section was repealed and a new s 162A substituted by the Biosecurity Law Reform Act 2012, s 74.

worse position than any person whose property or goods are not directly affected by the exercise of the powers.

(3) Compensation payable by a Minister or by a chief executive is payable from money appropriated by Parliament for the purpose.

(4) Compensation must not be paid under this section to any person—

(a) In respect of a loss in relation to unauthorised goods or uncleared goods; or

(b) In respect of a loss suffered before the time when the exercise of the powers commenced; or

(c) Who has failed to comply with this Act or regulations made under this Act and whose failure has been serious or significant or has contributed to the presence of the organism or to the spread of the organism being managed or eradicated.

(5) Any dispute concerning the eligibility for, or amount of, compensation must be submitted to arbitration and the provisions of the Arbitration Act 1996 apply.

(6) Nothing in this section applies to any loss suffered by any person as a result of the exercise of powers under this Act to implement a pest management strategy.

[211] With reference to the 1997 amendments the Primary Production Committee report stated:[200]

> Proposed new clause 90A includes new provisions for compensation to replace the provisions in sections 127(3), 149, 150(3)(c), (d) and (e), 153 and 164 of the Act. The new clause makes it clear when compensation may be payable and also sets out those situations where compensation will not be payable. Compensation for the use of powers to implement a [pest management strategy] is not affected by this new provision. …
>
> The Forest Health Advisory Committee, the New Zealand Dairy Board, the New Zealand Pork Industry Board and Federated Farmers considered there is a need for consistent compensation provisions when powers in the Act are used outside of a [pest management strategy]. We consider that clause 90A meets this need. Compensation is to be provided for losses caused by government exercising powers to manage or eradicate unwanted organisms. The rationale for the government paying compensation is to encourage the reporting of unwanted organisms so that they can be eradicated. The level of compensation payments and the cost of eradication provide government with a strong incentive to commence eradication of a potentially damaging unwanted organism as soon as possible after its presence has been reported.

[212] The Judge summarised the effect of s 162A in this way:[201]

---

200 Biosecurity Amendment Bill (No 4), above n 157, at xxiii.

201 High Court judgment, above n 2, at [446].

> This provides for compensation when powers are exercised under the Act for the purpose of eradicating or managing an organism. It applies where those powers cause loss as a result of damage to or destruction of a person's property, or where restrictions are imposed on the movement or disposal of goods under Part 6 (which covers such matters as detaining or seizing goods, putting in place road blocks or declaring restricted or controlled places) or Part 7 (which is concerned with declaring biosecurity emergencies). The provision is time bound: a claim must be made within a year.

[213] Having referred to the Primary Production Committee commentary the Judge then noted that compensation under s 162A is limited to losses from the exercise of post-border powers and is concerned with the exercise of powers once an unwanted organism is present in New Zealand.[202] Rejecting the Crown submission that s 162(4)(b) is a statutory exclusion addressed to the loss claimed here, the Judge said:

> [451] In my view, this provision is about when the Crown is obliged to pay compensation. It is intended to be comprehensive about the extent of compensation and the circumstances in which it will be paid when powers are exercised "for the purposes of the management and eradication of any organism". It does not say anything about whether there is a private law remedy for loss suffered due to acts or omissions of MAF or MAF personnel which do not involve the exercise of such powers because the section is not about this.

[214] We accept the respondents' submission that s 162A provides for compensation only in the narrow circumstances specified and that the Crown's contention overstates the effect of the provision. Hence we endorse the Judge's ultimate conclusion:

> [453] I therefore accept the defendant's submission that Parliament has turned its mind to when there will be a statutory entitlement to compensation. Those provisions apply irrespective of how the pest came to be in New Zealand and whose fault that may have been. However, as the plaintiffs submit, the provisions are of narrow ambit. They do not address loss suffered as a result of MAF negligence in carrying out its biosecurity functions pre-border and at the border. I agree with the plaintiffs that the Act leaves this to be addressed through civil claims in negligence in the ordinary way if a claim can be made out, consistent with ss 163 and 164 which contemplate civil liability, but subject to their scope.
>
> (footnote omitted)

[215] The Judge deferred consideration of the potential explicit exclusion of a duty of care by s 163 to the final stage of the judgment at pt 7 which engaged with

---

[202] At [449].

the Crown immunity arguments. We have previously addressed immunity in Issue 2 above where we:[203]

(a) agreed with the Judge's conclusion on the meaning of the phrase "without reasonable cause" in the proviso; and

(b) disagreed with the interpretation that s 163 does not apply to the acts or omissions of MAF personnel undertaking administrative responsibilities on behalf of the Minister at the pre-border stage.

For those reasons we have held that the Crown's appeal succeeds because the various MAF personnel alleged to owe a duty of care to the respondents are immune from suit. Hence there could be no vicarious liability for the Crown in respect of those personnel.

[216] However, for the purposes of the duty of care analysis it is necessary to proceed on the footing that those conclusions may not be upheld. That involves making dual assumptions: first, that s 163 applies only to inspectors, authorised persons, accredited persons or other persons formally appointed under the Act; secondly that "reasonable cause" is synonymous with "reasonable care".

[217] The implication of the first assumption is that a duty of care is not excluded in respect of persons who are not specifically identified in s 163. For present purposes that comprises the MAF personnel who participated in the decision to issue Kiwi Pollen's 2007 and 2009 import permits.

An absence of a close and direct legal relationship

[218] Emphasising that proximity is concerned with close and direct legal relationships, Mr Hodder observes that there was no physical nearness as between MAF personnel (based in Wellington and Auckland) and Strathboss (based in Te Puke) and there was no physical presence on, or oversight by, MAF personnel of Strathboss' premises or activities. There was neither a contractual or licensing arrangement between the parties, nor a professional or personal relationship. Contrast is drawn

[203] See above at [124]–[141].

with both *D Pride & Partners (a firm) v Institute for Animal Health*[204] and *Weller & Co v Foot and Mouth Disease Research Institute*[205] where the defendants had brought foot and mouth disease virus to a particular area for its own research purposes, and *Givskud v Kavanaugh*[206] where a government inspector had been specifically asked by a plaintiff to test the seeds of a seed seller but declined to do so.

[219] Consequently it is submitted first that the Judge's proximity analysis failed to consider whether a close and direct legal relationship existed between any member of MAF personnel and the respondents, and second that no such relationship existed. Consistent with that approach Mr Hodder accepted the proposition put from the Bench that there would likely be proximity between the relevant MAF personnel and Kiwi Pollen, it being an applicant for a permit for the importation of and clearance of the June 2009 consignment.

[220] The point is also made that vulnerability is not a sufficient test for the close and direct relationship required in this context. The majority judgment in *Couch (No 1)* makes it clear that to be determinative vulnerability must be related to special risk circumstances which truly distinguish the position of the plaintiffs in relation to the risk.[207]

[221] We accept the respondents' submission that proximity is concerned with a legal concept of relationship and "neighbourhood", the court being required to consider the closeness of the connection between the parties.[208] We do not consider that there was any error in the approach of the Judge who commenced her analysis by citing the well-known extract from the judgment of Lord Atkin in *Donoghue v Stevenson*.[209] Neighbours in law were identified as those:

---

204 *D Pride & Partners (a firm) v Institute for Animal Health* [2009] EWHC 685 (QB).
205 *Weller & Co v Foot and Mouth Disease Research Institute* [1966] 1 QB 569 (QB).
206 *Givskud v Kavanaugh* (1990) 109 NBR (2d) 65 (NBQB).
207 *Couch (No 1)*, above n 179, at [122]–[124]. Reliance was also placed on other biosecurity cases such as *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54, (2002) 211 CLR 540; and *Regent Holdings Pty Ltd v State of Victoria* [2013] VSC 601.
208 Referring to *The Grange*, above n 147, at [158].
209 High Court judgment, above n 2, at [236], citing *Donoghue v Stevenson* [1932] AC 562 (HL) at 580.

> … so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

[222] That passage was quoted by Elias CJ in *Couch (No 1)*.[210] It followed close on the heels of reference to the observation of Gault J in *Wellington District Law Society v Price Waterhouse* that proximity between defendant and plaintiff is "a broad concept not confined to the closeness of the relationship".[211] The point was usefully reiterated by Lord Atkin in *Donoghue* where, referring to a passage from *Le Lievre v Gould*,[212] he said:[213]

> I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.

[223] We do not accept the proposition that proximity is confined to what the Crown submission describes as "[a]n actual relationship", such as that between MAF personnel and Kiwi Pollen as an import permit applicant. In our view the combination of factors identified in the judgment reflected the intensely fact specific nature of the proximity inquiry. Those factors, which amply supported the conclusion that the requisite relationship embraced New Zealand kiwifruit growers generally, included:

(a) knowledge of MAF personnel that kiwifruit was a key export crop for which border security was of real importance;

(b) knowledge that Psa was a pest;

(c) the difficulty in containment of the disease coupled with the fact that kiwifruit growers in New Zealand are highly concentrated geographically;

---

210 *Couch (No 1)*, above n 179, at [50].
211 *Wellington District Law Society v Price Waterhouse* [2002] 2 NZLR 767 (CA) at [42].
212 *Le Lievre v Gould* [1893] 1 QB 491 (CA) at 504.
213 *Donoghue v Stevenson*, above n 209, at 581.

(d) the operational control exercised by MAF personnel at both the pre-border (import permit approval) and border (inspection) stages;

(e) the inability of growers to take steps to reduce border security risk; and

(f) hence the inevitable reliance upon MAF personnel to manage and control risks to the industry and the growers' particular vulnerability to the consequence of a failure to manage and control those risks.

MAF personnel neither direct cause nor primary source of harm

[224] This challenge focuses first on the Judge's inclusion as a feature supporting a duty of care the fact that those having property rights in kiwifruit vines or crops had suffered physical damage from harm "directly caused" to their property.[214] Mr Hodder points out that the direct harm to kiwifruit growers' properties was caused by Kiwi Pollen through its application of pollen or anthers waste, infected with Psa3, to either the Olympos or Kairanga orchards. Any harm caused by MAF personnel (which was disputed) was indirect, such personnel being in a similar position to the classification society in *Marc Rich & Co AG v Bishop Rock Marine Co Ltd.*[215] The reasons for the House of Lords' conclusion that the society did not owe a duty to cargo owners in respect of a survey performed on a damaged ship included the fact that no direct physical loss had been caused by the society.

[225] Mr Hodder also takes issue with the Judge's view that the conduct of MAF personnel in considering and granting the import permit applications and clearing the importations were positive acts carried out negligently and therefore not a classic case of omission.[216] He submits that *Michael v Chief Constable of South Wales Police* had been inappropriately distinguished on the basis it was an omissions case, contending that it is possible in almost any series of events to find both omissions and positive acts.[217] A more helpful inquiry is said to be "who was the primary source of the risk?" He submits the correct answer here is the importer, Kiwi Pollen, who had

---

214 High Court judgment, above n 2, at [495(a)].
215 *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] 1 AC 211 (HL).
216 High Court judgment, above n 2, at [376].
217 *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732.

previously told MAF personnel that it was importing only pollen (no mention was made of plant material) and who did not contact MAF personnel when, instead of pure pollen, a consignment of anthers was received.

[226] Kiwi Pollen was just one of thousands of entities that import goods into New Zealand every day, each of whom has made a choice to do so and ultimately has control over the use of the goods. By contrast, the granting of import permits is not a voluntary intervention by MAF personnel into a field of activity. Rather they are charged with managing the border under the Act in the context of the international obligation under the SPS Agreement to allow goods into New Zealand absent a scientific justification not to do so.

[227] Mr Hodder submits that this claim is in substance a claim of a duty to prevent harm for which others, the importers, are primarily responsible. It is not fair, just or reasonable to hold MAF personnel morally culpable (the ultimate foundation of negligence liability) for the Psa3 incursion on the ground that they failed to prevent a third party from bringing a dangerous good into New Zealand.

[228] We agree with the respondents that the Judge did not make an erroneous finding that MAF personnel directly harmed the respondents when they obviously did not. As they explained, the Judge was simply drawing a distinction between cases involving physical damage to property (where courts have readily imposed duties of care) and cases involving economic loss (where courts have been less willing to do so).

[229] We do not accept that the Judge erred in distinguishing *Michael* as being an omissions case. The present case is not one where a public authority had powers to intervene and failed to do so. On the contrary, and as the respondents argued, MAF personnel were involved in creating the risk and they had direct control over that risk (through their ability to control the entry of risk goods into New Zealand albeit within the context of the SPS Agreement). Developing the point noted at [225] above, the Judge recognised that the tasks with which the MAF personnel were charged, in deciding whether to grant the Kiwi Pollen application and whether the June 2009

consignment should be cleared, were positive actions carried out allegedly negligently. The Judge stated:

> [377] MAF's omissions in this case are part of wider positive conduct. They do not engage the concerns associated with the omissions principle. Nevertheless the direct cause of the loss was a bacterial pathogen in risk goods imported by a third party (Kiwi Pollen). As was said in *Robinson*, generally there is no liability for failing to prevent harm caused by other people or by natural causes. It is therefore appropriate, by analogy with cases involving third parties who have caused harm, to consider the extent to which MAF had control over the risk.
>
> (footnote omitted)

[230] Furthermore as the respondents submit, the courts have routinely recognised duties for failing to prevent harm caused by third parties. In *Dorset Yacht* the primary source of risk was the borstal trainees (not the Home Office employees). In *Couch (No 1)* it was Mr Bell (not the parole officer). In the building inspection cases the primary sources of risk were the building, the environment and the builder (not the inspector). The respondents emphasise that in none of these familiar examples did the existence of an external source of risk not within the defendant's control mean that the defendant could not owe duty of care.[218]

Couch (No 1)

[231] Following the path foreshadowed at [377] of the judgment,[219] the Judge proceeded to analyse the extent of MAF's control over risk and the reliance on it by others. Noting the view of the majority in *Couch (No 1)* that, where a duty is founded on a public authority's power to control a risk (in that case the risk of a third party) in a way which would have prevented the harm, it is also necessary to consider the relationship between the defendant and the plaintiff, the Judge stated:

> [401] The existence of an identifiable person or group that is foreseeably subject to a special and distinct risk therefore provides the necessary connection (proximity) between a defendant and a plaintiff when a defendant is exercising powers which are for the public good.

---

[218] We note that we construe the submission in this way, although the respondents' written submissions refer to "an external source of risk within the defendant's control".

[219] See above at [229].

[232] Consequently the Judge concluded that, in line with *Couch (No 1)*[220] the relevant questions were:[221]

(a) what MAF knew or ought to have known about the biosecurity risks of pollen; and

(b) whether the respondents were a distinct and identifiable group likely to be especially within the foreseeable risk.

[233] The Crown challenges both the quoted proposition above and the invocation of *Couch (No 1)*, arguing that the Judge had side-stepped the caution in *Michael* and *Robinson* regarding the failure of protective systems set up from public resources. It contends that what *Couch (No 1)* requires is:

(a) there was a clearly apparent risk;

(b) MAF had control over the immediate wrongdoer; and

(c) Strathboss was a member of a sufficiently delineated class so as to be at special risk (ie was particularly vulnerable to suffering harm of the relevant kind).

[234] Mr Hodder submits that the Psa3 incursion was not a clearly apparent risk in the sense discussed in *Couch (No 1)* where the relevant probation officer knew that Mr Bell was a violent offender with a history of distinctively gratuitous and random violence when undertaking robbery. By contrast the risk of Psa3 presented by kiwifruit pollen in April 2009 did not come close to that threshold. The proposition that MAF ought to have known about the biosecurity risks of pollen was challenged, in particular on the ground that until May 2010 nobody knew that live cells of Psa could be associated with pollen.

---

220 *Couch (No 1)*, above n 179, at [85].
221 High Court judgment, above n 2, at [401].

[235] Mr Hodder further submits that the coexistence of foreseeability of risk and a power to avert harm from the risk does not establish a duty of care. That is not what the case law means when it speaks of "control". Significantly *Couch (No 1)* and *Dorset Yacht* are part of a narrow class of cases where the defendant had prior lawful physical custody of the active injurer. He submits that given the conditions on which the 2009 permit was issued it was not clear that Ms Hamlyn, the managing director of Kiwi Pollen, was in possession of unauthorised goods or that she knew she was. However, irrespective of her state of mind, the goods were cleared on the basis of (at least) misleading and incomplete information provided by the importer. But MAF personnel rely and have to rely on information that importers provide as being correct.

[236] We do not accept the Crown's characterisation of the judgment as "side-stepping" the reasoning in *Michael* and *Robinson*. The Judge discussed those cases, the omissions principle and its exceptions. The Judge concluded that, as explained in *Robinson*, *Michael* is indeed an omissions case which is distinguishable from the present because of the alleged negligent actions of the MAF personnel.

[237] We agree with the respondents that Strathboss and other kiwifruit growers were not, as the Crown categorises them, simply "part of the general population of New Zealand primary producers that [is] subject to biosecurity risks". On the contrary as kiwifruit growers they were a class specifically at risk from the introduction of a kiwifruit pathogen. As the respondents pertinently observe, a notable omission from the Crown's submission is the Judge's observation:

> [408] In my view it is possible to distinguish between the various layers of the kiwifruit industry. As the defendant acknowledges in his submissions, the kiwifruit orchard growers are the most clearly identifiable class of persons who could be foreseen to be adversely affected by the relevant acts or omissions in allowing kiwifruit pollen to be imported. When Kiwi Pollen made its first request to import *Actinidia* pollen on 23 November 2006, it advised "[t]he pollen will be used for pollinating kiwifruit orchards in New Zealand". MAF was also advised that Kiwi Pollen had not imported kiwifruit pollen before — so MAF also knew this would be the first time pollen imported by Kiwi Pollen would be applied to New Zealand kiwifruit orchards. Kiwifruit orchardists were the clearly apparent class of persons whose property (the kiwifruit vines and their crop) would be directly harmed

> if the pollen contained pathogens. The consequences beyond that immediate harm is at least one step or more removed.

We also accept that the law does not require MAF personnel to have specific knowledge of each member of the class: knowledge of the class itself is sufficient.[222]

[238] The undoubted absence of control over Ms Hamlyn does not avail the Crown. The judgment rests on the premise that MAF personnel had control over what risk goods may be imported and on what conditions.[223] The Judge viewed the power of MAF personnel to control the risk (pathogens on plant imports) as comparable to the Probation Service's power to control a parolee which involves (through the Parole Board) deciding whether the person incarcerated may be released on parole and on what conditions.[224] Subject to compliance with the requirements of the Nursery Stock IHS, we agree with that analysis.

[239] At the pre-border stage MAF personnel could not of course have actual physical custody of the proposed consignment because it has yet to arrive. We do not consider that custody is a prerequisite, at least at the pre-border stage. The decision at that earlier point, including the nature of any quarantine requirements, will circumscribe the permission to import the June 2009 consignment and how it would be managed on entry.

Conclusion on proximity of relationship

[240] The focus of the respondents' duty argument before us concerns the omission of a risk assessment in relation to the intended use of the imported pollen for commercial kiwifruit pollination. The Crown's case tends to focus on the point that the import permits did not include a specific condition requiring PEQ, arguing that the terms of the permits reflected a policy revision which was not amenable to a private law duty of care. However, as we have explained, we consider that the effect of cl 2.2.1.12 was that a minimum three month PEQ condition was mandatory.[225] MAF officials were not entitled to ignore that requirement notwithstanding that it was

---

222 *Couch (No 1)*, above n 179, at [112] and [117].
223 High Court judgment, above n 2, at [406].
224 At [407].
225 See above at [63].

inconsistent with the proposed use of the June 2009 consignment for commercial pollination. However the failure to observe the mandatory PEQ condition does not preclude the recognition of a duty of care in respect of the discharge of statutory functions in relation to the importation of kiwifruit pollen for a proposed new manner of use.

[241] Our conclusion at this stage of *The Grange* framework would have been that in respect of the decision to grant an import permit for pollen to be used in the commercial pollination of kiwifruit orchards without first undertaking a risk assessment there would have been sufficient proximity between the relevant MAF personnel and, at the least, the Strathboss class who had "property rights". The question whether a wider class of plaintiff should have been entertained is addressed in our discussion of policy and the cross-appeals.

Policy

[242] The Crown advanced three distinct propositions in support of the argument that a duty of care was negated for policy reasons:

(a) indeterminate and disproportionate liability;

(b) conflicting interests and regulatory decisions; and

(c) incompatibility with the public law framework for accountability.

Indeterminate and disproportionate liability

[243] In the High Court the Crown submitted that a duty of care would expose the Crown to liability of an indeterminate amount, to an indeterminate class for an indeterminate time:[226] that, if ever there was a case in which the spectre of unlimited liability compelled a finding that there was no duty of care, it was the present one.[227] The respondents' proposition that the duty alleged was more specific was portrayed as

---

[226] A re-ordering of the phrase coined by Cardozo CJ in *Ultramares Corp v Touche* 174 NE 441 (NY Ct App 1931) at 444 and adopted by Richardson J in *Fleming v Securities Commission*, above n 177, at 533.

[227] High Court judgment, above n 2, at [455].

advancing a duty in a narrow "situational" (or backward-looking) manner. The Crown submitted that at its core the growers' claim was one of liability for failure to protect their economic expectations against the adverse consequence of a biosecurity risk crossing the border and being realised. Such liability involved the potential indemnification of participants in any primary industry against such consequences and thus quite enormous levels of damages.[228] A foot and mouth disease incursion was cited as a hypothetical example.

[244] The Judge acknowledged the force of the argument:

> [461] I accept that, if a duty of care is imposed in this case, it would potentially apply to other biosecurity incursions for which MAF's negligence could be shown. If all the economic consequences of such incursions were to be shouldered by the Crown, this could give rise to very large damages claims. The defendant considers that if the plaintiffs' claim here succeeds in full, quite enormous levels of damages would be payable. It says the amounts claimed, for example, well surpass the entire 2009/10 appropriation for Vote Biosecurity (an amount of $185.6m). Other incursions in other industries may give rise to even greater losses. On the face of it, this is a strong point in the defendant's favour. There is no doubt biosecurity is a complex task and, if mistakes are made, there is the potential for significant harm and financial consequences.

[245] The Judge then noted that biosecurity incursions have the potential to cause significant economic consequences for New Zealand even where they have arisen through no one's fault, commenting that, regardless of the cause, the government may be required to provide substantial compensation if it is in the public interest to order destruction of crops or livestock in order to eradicate or manage the incursion. She posed the question whether the government's response to biosecurity incursions (that is, whether to provide compensation and to what extent) should be determined solely by the government when a ministry has been negligent. While recognising that may possibly be appropriate, the Judge considered it involved making assumptions about the implications beyond the instant case.[229]

[246] The Judge proceeded to discuss factors which might serve to delimit the indeterminacy concern. She first placed significance on devices within negligence law capable of restricting the scope of liability. Proximity in particular was identified

---

228 At [456].
229 At [463].

as an important controlling device on indeterminate liability, as demonstrated by the finding of a narrow class to whom a duty was owed, namely those who had "property rights" in the vines or crops infected with Psa3 or treated as though they were infected. Those who did not suffer direct loss because they did not have such "property rights" were not in a proximate relationship:[230]

> Pure economic loss is a relevant factor in New Zealand when considering proximity in a novel situation. Those who suffered pure economic loss in this case were not sufficiently proximate to MAF when it was considering Kiwi Pollen's permit application.

[247] The Judge identified further limiting factors, namely proof of negligence, causation and sufficiently proximate loss, in support of the point that liability "is not necessarily a case of all or nothing".[231] She noted that the Supreme Court's decision in *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council*[232] expressed no concern about disproportionality.[233] The possibility of insurance was viewed by the Judge as a neutral factor in the policy analysis.[234]

[248] Ultimately the Judge considered there was a societal benefit from corrective justice, stating that if a person is harmed by the negligence of a government body, it is in society's interest that the government restores the harm it has caused unless there is a sufficiently countervailing public interest.[235] She was not persuaded that generalised concerns about indeterminate and disproportionate liability provided a sufficiently countervailing interest to displace the corrective justice interest in this case.[236]

[249] The respondents support that conclusion, emphasising the point made in *The Grange* that policy reasons will only negate a duty of care in a relatively small number of cases.[237] To do so the policy considerations must be so strong as to require departure from ordinary principles of compensatory justice such that a victim will be left to bear reasonably foreseeable loss caused by a proximate defendant. They submit

---

230 At [465].
231 At [466]–[468]. Contributory negligence was also noted at [472].
232 *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2017] NZSC 190, [2018] 1 NZLR 278.
233 High Court judgment, above n 2, at [472].
234 At [477].
235 At [478].
236 At [480].
237 *The Grange*, above n 147, at [160].

that any consideration of proportionality must be considered as a whole and in the context of the interests of justice,[238] pointing out that this Court in *Te Mata Properties Ltd v Hastings District Council* cited the dicta of Lord Denning MR in *Dutton v Bognor Regis Urban District Council* to the effect that a plaintiff who was in no way responsible for her loss deserved to be compensated.[239]

[250] They argue that through no fault of their own the growers have suffered substantial losses caused by the failure of MAF and its personnel who have "broad shoulders". Finally they submit that New Zealand courts have been willing to consider economic efficiency in the context of the policy inquiry,[240] making the point that a fundamental goal of tort law is that legal responsibility should be borne by the cheapest cost avoider,[241] in the present case said to be MAF and its personnel.

[251] It is of course correct that not every biosecurity incursion will result in a successful negligence claim against the Crown. However the fact that the several elements of the tort must all be established is no reason to dismiss the indeterminacy concern. If it were otherwise, then the indeterminacy concerns raised by all of the common law appellate courts since Cardozo CJ's seminal statement in *Ultramares v Touche*[242] were misconceived. The common law's concern to avoid the imposition of indeterminate liabilities in negligence is reflected in the following observations of the Ontario Court of Appeal in *Attis v Canada (Minister of Health)*:[243]

> Indeterminate liability, in my view, is the most relevant policy consideration because the imposition of a duty of care in this case may result in the government becoming the virtual insurer of medical devices. The appellants argue that indeterminate liability is not a concern because the number of affected consumers in this proceeding is relatively contained. However, Health Canada's responsibilities extend far beyond the regulation of the specific devices at issue in this case to the regulation of thousands of other devices. In addition, potential liability could extend from medical devices to other products regulated under the *FDA*, such as food, drugs and cosmetics, as well as to many other regulatory regimes. It follows that the

---

238 Again referring to *The Grange*, above n 147, at [231] per Tipping J.

239 *Te Mata Properties Ltd v Hastings District Council* [2008] NZCA 446, [2009] 1 NZLR 460 at [24], citing *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA) at 397–398.

240 Referring to *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*] at [32]–[33].

241 Referring to Guido Calabresi *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, New Haven, 1970) at 135.

242 *Ultramares Corp v Touche*, above n 226, at 444.

243 *Attis v Canada (Minister of Health)* 2008 ONCA 660, (2008) 300 DLR (4th) 415 at [74].

> imposition of liability on the public purse would place an indeterminate strain on available resources.

[252] Indeterminacy is an important issue in this case. The profit to growers in the kiwifruit industry alone calculated on the basis of the particulars of Strathboss' claimed loss of profits over four years is $2.47 billion. If a duty of care is owed in relation to the consideration of import permit applications for kiwifruit pollen, the same duty would logically apply to pollen for all plant types.

[253] Indeed it would follow that a similar duty would apply to prospective importations of all risk goods. The potential losses which might be claimed for breaches of such duties could be immense. A 2014 Economic Impact Assessment estimated that a large-scale foot and mouth disease incursion in New Zealand would result in a net present value loss in real GDP over the years 2012 to 2020 of $16.2 billion.[244] The Judge recognised this is a strong point.[245] She was right to do so.

[254] However the strength of that consideration appears to have been diluted in the Judge's analysis by a perception of the liability-limiting devices in negligence law. The Judge considered that growers with property rights in the kiwifruit crop were within the class that was distinctly identifiable as at special risk.[246] By contrast those without such rights did not suffer a direct loss but rather purely economic loss. They were thus not in a proximate relationship.

[255] The physical/economic loss distinction is both problematic in itself and complex in its application to the circumstances of this case. The Judge viewed Seeka's claim as a PHO as a loss suffered because of business relationships with growers which was more removed from the immediate consequences of the alleged negligence. However, on the cross-appeal the point was emphasised that the relationship with growers is close, being part of an integrated and mutually dependent chain of production and getting product to market. Seeka depends on growers for product to

---

244 Rod Forbes and Andre van Halderen *Foot-and-Mouth Disease Economic Impact Assessment: What it means for New Zealand* (Ministry for Primary Industries, Technical Paper 2014/18, August 2014) at 6.

245 High Court judgment, above n 2, at [461].

246 At [413].

store and pack. Growers depend on Seeka to give advice on orchard management and to actually harvest and manage the fruit at every point of the process in order to efficiently get their products to market and maximise their profit.

[256] The economic structure of the kiwifruit industry reinforces the symbiotic relationship between growers and PHOs. Their inter-dependence extends to ownership with many PHOs having some form of direct grower ownership and nearly all kiwifruit growers who pack with Seeka being shareholders. While Seeka's cross-appeal is resolved by our findings on immunity in Issue 2, the basis of the cross-appeal serves to highlight the dangers inherent in analysing duty in a situational manner.

[257] In our view the demarcation which the Judge made between the categories of claimants in this case serves to obscure the significance of the true scale of losses for which liability may arise. We consider there is justification for Mr Hodder's criticism that the Court erroneously focused on a situational duty of care, contrary to the warnings in *Attorney-General v Body Corporate 200200*.[247] We agree with the Crown that the limitation which the Judge placed on the duty of care by drawing a distinction between the different classes of claimant does not assuage the indeterminacy concern.

[258] The fact that the Crown is the defendant is not a reasonable rejoinder to the problem of indeterminate liability. As this Court stated in *Attorney-General v Carter*:[248]

> There is a legitimate public interest in regulatory bodies being free to perform their role without the chilling effect of undue vulnerability to actions for negligence. Whether it be a case of failing to issue or of issuing a survey certificate, the threat of legal liability for economic loss might subject the survey authority to inappropriate pressures to the detriment of the overall public interest. For this kind of reason the trend of authority is generally not to hold the regulator liable to the regulated for economic loss, even if negligence can be shown: …

---

247 *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 (CA) at [43].

248 *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) at [35], citing *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 (PC); *Fleming v Securities Commission*, above n 177; and *Cooper v Hobart* 2001 SCC 79, [2001] 3 SC 537.

[259] The Judge was not persuaded that what she described as generalised concerns about indeterminate and disproportionate liability provided a sufficiently countervailing interest to displace the corrective justice interest in this case.[249] As the Judge explained:[250]

> The defendant submits that the public of New Zealand should not become the insurer or guarantor of losses which are suffered by particular persons or industries. Public authorities exercising regulatory functions must deal with the world at large. The regulator, by and large, regulates for the very purpose of protecting the general public. The same point, however, applies to councils in the building cases. Ultimately there is a societal benefit from corrective justice. If a person is harmed by the negligence of a government body, it is in society's interests that the government restores the harm they have caused, unless there is a sufficiently countervailing public interest.

[260] We do not agree. The implications of indeterminate liability of the scale in contemplation here are of such significance that even the Crown ought not to be cast in the role of indemnifier. Indeed it is for that very reason that the applicable legislation contains a form of immunity from suit although we are of course assuming that it does not apply here. If liability of this magnitude is to be contemplated for biosecurity hazards, we suggest that it would be better it be introduced by legislation, in which its metes and bounds might be thoroughly examined and laid down.

[261] On the issue of disproportionality, Mr Hodder notes the concern raised in *Regent Holdings Pty Ltd v State of Victoria* that the potential liability of the state tortfeasors was disproportionate to any fault.[251] He also draws attention to the comment of Richardson J in *Fleming v Securities Commission* that the cost structure of newspaper advertising space would have to change if the publisher had to accept or share the responsibility of erroneous financial advertisements.[252] He observes that a $105 fee for an import permit application stood in stark contrast to a claim of $6 per tray of kiwifruit (which he extrapolates to be $2.4 billion over three years for the entire body of commercial kiwifruit growers).

[262] However as Blanchard J stated in *The Grange*, a particular concern will be whether a finding of liability will create disproportion between a defendant's

---

249 High Court judgment, above n 2, at [480].
250 At [478].
251 *Regent Holdings Pty Ltd v State of Victoria*, above n 207, at [225].
252 *Fleming v Securities Commission*, above n 177, at 532.

carelessness and the actual form of loss suffered by the plaintiff.[253] This involves introducing into the equation the nature and gravity of the assumed breach.

[263] As we have noted, this case is unusual in that the assumed breach to undertake a risk assessment is dependent or sequential on there having been a failure by MAF to observe the quasi-legislative PEQ requirement. However that does not serve to diminish the nature and gravity of the assumed breach. While we have recognised the importance of indeterminacy in this case, we do not consider that the disproportionality argument is a significant additional factor.

Conflicting interests and regulatory decisions

[264] Under this banner the Crown reprises its argument that, in deciding what risk goods may be imported into New Zealand and under what conditions (as it was put, either under an IHS or an import permit), MAF personnel undertake quasi-legislative decisions that involve prioritising competing interests. It renews the challenge to the Judge's "hand in hand" conclusion[254] and the analysis of the way in which conflicting interests are resolved.[255] Those contentions have already been addressed in our consideration of the Crown's justiciability argument.[256]

[265] The submission is then made that the evidence did not support the notion, said to be evident in the judgment, that resolution of the various interests is easy. We do not read the judgment as espousing that view. On the contrary, the Judge said that at the pre-border stage MAF personnel may have to balance difficult scientific questions and factors.[257] Similarly with reference to the border itself the Judge remarked:

> [385] Again, MAF's border control role is a difficult one. This is because the bottleneck delays goods from reaching their destination within New Zealand. The border control must therefore balance the need to protect New Zealand from risk goods with the need not to unduly hinder commerce through border delays. Nonetheless, the fact remains that MAF exercises control over this, admittedly difficult, process.

---

253 *The Grange*, above n 147, at [159].
254 See above at [161].
255 See above at [187].
256 See above at [177]–[191].
257 High Court judgment, above n 2, at [383].

[266] Earlier in the course of consideration of the border justiciability issue, the Judge had noted the potential implications for trade and commerce of recognition of a duty of care, recording the Crown's submission in this way:

> [354] The defendant submits imposing a duty of care here would require the Government to reprioritise biosecurity resourcing. If formal risk analysis is required for every import request, this may bring trade to a standstill while importers await the completion of formal risk analysis. This in turn may incentivise illegal import (smuggling) of risk goods and increase the biosecurity risk to New Zealand. The defendant says there is also the prospect that New Zealand's trading partners may criticise New Zealand for taking an overly conservative approach to risk analysis.

[267] Mr Hodder presses this point, emphasising that the extension of the negligence boundaries recognised in the judgment will have inevitable consequences for resource allocation, public expenditure and the risk of defensive regulatory behaviours.

[268] Such a consequence resonated with Lord Toulson in *Michael*. Viewing as speculative the proposition that the addition of potential liability at common law would make a practical difference at an individual level to the conduct of police officers and support staff, Lord Toulson said:[258]

> 121 … At an institutional level, it is possible to imagine that it might lead to police forces changing their priorities by applying more resources to reports of violence or threatened violence, but if so, it is hard to see that it would be in the public interest for the determination of police priorities to be affected by the risk of being sued.
>
> 122 The only consequence of which one can be sure is that the imposition of liability on the police to compensate victims of violence on the basis that the police should have prevented it would have potentially significant financial implications. The payment of compensation and the costs of dealing with claims, whether successful or unsuccessful, would have to come either from the police budget, with a corresponding reduction of spending on other services, or from an increased burden on the public or from a combination of the two.

[269] In our view this is an additional telling consideration which serves to negate the imposition of a duty of care in the present case.

---

[258] *Michael v Chief Constable of South Wales Police*, above n 217.

Incompatibility with public law framework

[270] The Crown contends that any new duty of care must sit coherently within the legal framework governing the subject matter as a whole. It points to a number of proceedings that may be commenced where a plaintiff alleges a failure in public decision-making:

(a) the tort of breach of statutory duty;

(b) misfeasance of public office;

(c) declaratory judgments; and

(d) judicial review.

[271] However the Judge considered that a private law duty of care did not cut across other accountability mechanisms. We agree. As the respondents submit, there is extensive authority recognising common law negligence claims against public bodies acting under statute. In *X (Minors) v Bedfordshire County Council* the House of Lords held that the availability of public law causes of action would not preclude the availability of private law claims founded on common law duties of care,[259] a dictum adopted by this Court in *Attorney-General v Carter*.[260]

[272] The duty of care in this case concerns the grant of an import permit for pollen in the knowledge of an intended new use without undertaking a risk assessment. While the types of proceeding to which the Crown refers, in particular (a) and (d), might be apt in relation to a failure by MAF to comply with a quasi-legislative PEQ requirement, that is not the thrust of the respondents' claim. They disavow any claim for breach of statutory duty. While their claim may not have arisen at all had the PEQ requirement been observed, in our view their claim in negligence is not incompatible with the public law framework.

---

259 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) at 730–731.
260 *Attorney-General v Carter*, above n 248, at [41].

Conclusion on duty

[273] The analysis of the nature of the connection between MAF personnel and the respondents, which derives from the environment of the Act, points to a prima facie duty of care in relation to the assessment of the risk associated with the importation of risk goods, being pollen intended to be utilised in a new manner. Such a duty is not excluded by the provisions of the Act when interpreted in a manner that assumes our conclusion on the immunity issue is in error.

[274] However in our view policy considerations, primarily the spectre of indeterminate liability, weigh strongly against the imposition of a duty of care in relation to the pre-border conduct. Thus we would have concluded that the imposition of the asserted pre-border duty of care would not be fair, just or reasonable.

[275] Notwithstanding this general conclusion, we consider there are additional reasons why we would have found that no duty should exist either to consult or in relation to the PHEL Review. We therefore address those aspects separately below.

Additional aspects

Duty to consult

[276] The final aspect of the reformulated duty of care, namely consultation with the kiwifruit industry, received little attention in the argument before us.[261] The asserted duty is said to require:

> appropriate consultation with the kiwifruit industry as required by s 22 of the Biosecurity Act, the Risk Analysis Procedures and MAF's policy statement on consultation.

[277] Save for two exceptions,[262] s 22(6) requires consultation by the chief technical officer before making a recommendation to the Director-General on the issue or amendment of an IHS. The consultation, which may be on the IHS or on a risk analysis

---

[261] See above at [152].

[262] The exceptions are urgency or minor amendment: Biosecurity Act, s 22(6).

or assessment,[263] must be with persons considered to be representative of the classes of persons who have an interest in the IHS.

[278] Neither the Risk Analysis Procedures nor the consultation policy statement contemplates consultation taking place subsequent to the completion of the IHS process.[264] The latter document records that MAF Policy (a team within MAF) consults on primary and subordinate legislation, policies and standards. It states:

> Consultation will be undertaken only in establishing or reviewing a policy. Once a policy is established, its application to individual cases will not be subject to consultation, but may be a subject of further clarification or discussion.

[279] We do not discern that either of those documents or s 22 imposes an obligation to undertake consultation on the determination of individual import permit applications. Hence we reject the proposition that consultation as alleged is "required" by those documents or s 22.

[280] While that conclusion determines the issue, we briefly comment on the appropriateness of a duty of care in the context of the consultative function. In *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries*[265] the Supreme Court referred with approval to the principles applicable to consultation which emerged from this Court's decision in *Wellington International Airport Ltd v Air New Zealand* where it was said that "consultation" clearly requires more than prior notification:[266]

> … for consultation to be meaningful, there must be made available to the other party sufficient information to enable it to be adequately informed so as to be able to make intelligent and useful responses.

---

263 Section 22(7).

264 The Risk Analysis Procedures was a detailed document completed by MAF in 2006 specifying a biosecurity risk analysis framework.

265 *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries* [2013] NZSC 154, [2014] 1 NZLR 477 at [168].

266 *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at 676.

Further, having been informed, those consulted must be given a fair opportunity to express their views which must then be considered by the policy maker with an open mind.[267]

[281] Both the Risk Analysis Procedures and the consultation policy envisage a consultation obligation of that nature. Indeed the requirement to heed the views of those consulted was recognised in s 22A(1) of the Act which was introduced by the Biosecurity Amendment (No 2) Act 2008:[268]

> **22A Process for independent review panel to be established**
>
> (1) The Director-General must, by notice in the *Gazette*, set out the process by which an independent review panel is to be established to review whether, in developing an import health standard, there has been sufficient regard to the scientific evidence about which a person consulted under section 22(6) has raised a significant concern.

As Elias CJ observed in *New Zealand Pork Industry Board*, it is clear from ss 22 and 22A that industry participants have an important contribution to make in setting IHSs.[269]

[282] However we have reservations whether a tortious duty of care is apt in a bilateral scenario where it is envisaged that there will be participation on the part of the person to whom the duty is said to be owed. Traditionally negligence is defined purely by reference to the quality of a defendant's conduct. Accordingly duties of care have been unilateral in nature, for example the duty to warn in certain circumstances. We were not taken to any authority which would support the proposition that a duty of care should be owed by a person required to undertake consultation with another. Such an obligation has traditionally existed in the domain of statute and contract.

---

267 *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries*, above n 265, at [168].

268 As s 22A of the Act was only introduced in 2008, it applies in respect of the 2009 permit but not the 2007 permit.

269 *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries*, above n 265, at [9].

The PHEL Review

[283] While there was no reference to the PHEL Review in the claim as reformulated in this Court,[270] Mr Galbraith was unwilling to abandon the contention that a duty of care related to it which had been breached. We signal now that because of our conclusion that no duty could be owed in respect of the PHEL Review, we do not intend to deal with the alleged breaches relating to it, even though that aspect was the subject of extensive submissions.

[284] The PHEL Review was a literature review of plant pests and diseases transmitted by pollen for the purpose of assisting with a subsequent analysis of the risks associated with pollen importation. It was commissioned against the background of MAF's reconsideration of whether PEQ was really necessary for pollen. There had been growing frustration by growers at the cost and delay associated with PEQ requirements for imported nursery stock and there was a view that pollen might be better treated in the same way as seeds, given that the pests and diseases associated with pollen could be viewed as a sub-set of those associated with seed.

[285] Following internal and external peer review, the PHEL Review was finalised on 22 November 2006.[271] Relevantly it stated "there are no known bacteria, mollicutes or invertebrates that use pollen as a form of transmission". Specifically, in relation to kiwifruit, it stated:

> There are no recorded pests or pathogens that are pollen transmitted in *Actinidia* species.

[286] The pleading in the High Court did not contain specific reference to a duty of care in connection with the preparation of the PHEL Review, it being apparently subsumed in the alleged broad duty to exercise reasonable care and skill when undertaking functions and responsibilities under the Act.[272] However a specific allegation of breach of duty was expressed in this way:[273]

---

270 See above at [152].

271 It was subsequently published with some modifications and became known as the Card Paper but we continue to refer to it as the PHEL Review.

272 See above at [150].

273 Amended statement of claim at [124(a)(viii)]. Further allegations at [124(a)(ix)–(x)] addressed the reliance by MAF officers, agents and employees on the PHEL Review in concluding that pollen would not transmit Psa and the effect of this on risk assessment.

> The [PHEL Review] co-authored by MAF and Auckland University staff was insufficient, incorrect and mis-stated the risk of pollen transmission of bacteria[.]

[287] It is common ground that prior to 2010 it was not known that Psa3 could spread to kiwifruit plants via pollen. Nevertheless, the Judge held that the PHEL Review was misleading and wrong in its general statement of bacteria and the *Actinidia* section set out above. The Judge also held that the scope of the review was misunderstood and as a result a number of relevant scientific papers were not cited, papers that would have led to a different conclusion.

[288] The Judge found that MAF personnel failed in three respects to take reasonable care in breach of the duty found to be owed:[274]

> (a) The scope of the PHEL Review was not clearly set or clarified as between the principal author and the MAF scientist who was supervising the principal author. This meant that relevant literature about the association of bacteria with pollen was omitted.
>
> (b) The PHEL Review overstated the conclusion that could be drawn about pollen and bacteria generally from the reference on which it was based (which concerned a subset of bacteria that is transmitted differently to bacteria generally).
>
> (c) The PHEL Review was misleading about the association of bacteria and pollen in that it made an overly definitive statement given:
>
> (i) the limited … basis on which it was made (a particular and specific mechanism of pollen transmitted pests);
>
> (ii) the lack of clarity in the PHEL Review about its scope (both as to the particular and specific mechanism of pollen transmitted pests and as to the purpose for which the pollen would be used); and
>
> (iii) its assumption of "pure" pollen.

[289] The Crown appeals those findings, arguing that the Judge's conclusions were unjustified and affected by hindsight. And significantly for present purposes

---

[274] High Court judgment, above n 2, at [843]. A fourth finding concerned Dr Clover's response of 6 December 2006 to Ms Dickson's (see below at [302]) inquiry about a risk analysis for kiwifruit pollen.

the Crown argues that there is no tort of negligent information gathering on the part of public servants.[275]

[290] As Charleton J emphasised recently in *Cromane Seafoods Ltd v Minister for Agriculture*, negligence does not exist in a vacuum. Before one can find a failure to exercise reasonable care there has to be a clear definition of the duty of care which the negligent conduct is said to be a breach of.[276] Hence it is important to recognise the context for and the limits of the PHEL Review. It was commissioned as a literature review. It was not directed at any particular proposed importation. While it referred to various plant hosts, it was concerned with pollen at large, bearing the heading "Pollen-transmitted plant pathogens". As the Judge correctly noted:

> [805] The PHEL Review was not intended to be a risk assessment. This was evident from Dr Ormsby's response to Dr Fernando's comment during the peer review. The PHEL Review was an input, best described as part of a hazard identification, intended to assist with assessing pollen imports. It did not consider the likelihood of an organism or disease entering, establishing or spreading in New Zealand, the likely impact if it did, or measures to identify a managed risk. Rather it advised of the diseases known to be transmitted by pure pollen. It did not address the risk of contaminants. Nor was any public consultation undertaken.
>
> (footnotes omitted)

[291] As such, the literature review was initially intended to be an internal MAF resource. It did not have a specific external audience (though it was later published). We consider that its ultimate status is similar to the published works of the hypothetical scientist to whom Denning LJ referred in *Candler v Crane, Christmas & Co*:[277]

> … a scientist or expert (including a marine hydrographer) is not liable to his readers for careless statements in his published works. He publishes his work simply for the purpose of giving information, and not with any particular transaction in mind at all. But when a scientist or an expert makes an investigation and report for the very purpose of a particular transaction, then, in my opinion, he is under a duty of care in respect of that transaction.

---

275 Referring to *Adams v Borrel* 2008 NBCA 62, (2008) 297 DLR (4th) 400 at [73].

276 *Cromane Seafoods Ltd v Minister for Agriculture, Fisheries and Food* [2016] IESC 6, [2017] 1 IR 119 at [232].

277 *Candler v Crane, Christmas & Co* [1951] 2 KB 164 (CA) at 183.

[292] A similar approach was taken by the House of Lords in 2006 in *Sutradhar v Natural Environment Research Council* which involved a claim against the British Geological Survey (BGS), a department of the defendant, in respect of a report assessing the hydrochemistry of the main aquifer units in artesian wells in Bangladesh.[278] Lord Brown viewed BGS's position as akin to that of the notionally negligent marine hydrographer referred to in *Candler*, noting the lack of a "particular transaction".[279]

[293] The basis of those authorities lies in negligent misrepresentation whereas the criticism levelled at Dr Card and Dr Clover is more in the nature of negligent research or acquisition of information. However, as the Judge observed in the course of considering policy issues, it is not the case that negligent information gathering in formulating policy will necessarily give rise to liability; it will depend on the circumstances. Proximity is required.[280]

[294] It is difficult in our view to conceive that in the preparation of a resource such as a literature review the authors could be viewed as being in a relationship of proximity with all persons who might read and place reliance on their end product. To do so would be to recognise a duty of care in connection with the acquisition of information.

[295] Such a notion was rejected by the New Brunswick Court of Appeal in *Adams v Borrel*:[281]

> In my view, the day has not come where the law should recognize that government actors are liable for the formulation and implementation of discretionary policy decisions that are based in whole or in part on inaccurate information gathered in a negligent manner. Taken to its logical conclusion, this proposition gives resonance to the notion of unlimited liability to an unlimited class. In my view, recognition of a private law duty of care in cases of negligent information-gathering is simply too unwieldy. Too many government decisions are based on information that is later proven to have been conceived in error. Until today, no one has suggested that government authorities should be held accountable in negligence because a discretionary decision to adopt a solution to a pressing problem is infused with factual error.

---

278 *Sutradhar v Natural Environment Research Council* [2006] UKHL 33, [2006] 4 All ER 490.
279 At 504–505.
280 High Court judgment, above n 2, at [464].
281 *Adams v Borrel*, above n 275, at [73].

[296] Another way of analysing the negligence claim directed towards the literature review is to adopt the terminology employed in *George v Newfoundland and Labrador*, that MAF breached a duty of care owed to the respondents in the accumulation of information to inform a policy decision (the "input" stage) rather than by a failure to implement settled policy, namely the more usual "output" stage.[282]

[297] Whichever way the research task is analysed, whether as negligent information gathering or a policy decision "input", we do not consider that there was a sufficiently proximate relationship between Dr Card and Dr Clover and readers of their review in general or the respondents in particular. Consequently we would have rejected the contention that Dr Card and Dr Clover owed a duty of care in connection with the preparation of the PHEL Review.

Issue 3(b): Did the High Court err in holding that MAF personnel breached their duty of care by acts or omissions at the pre-border stage?

[298] Despite our conclusion as to a lack of duty, we nevertheless consider the Crown's argument in relation to breach of duty.

The issues

[299] Excluding the allegations of pre-border negligence relating to the PHEL Review and the failure to consult the industry (for the reasons discussed earlier) the Judge found negligence by MAF personnel in:

(a) advising the Plant Imports Team about the effect of the PHEL Review;[283] and

(b) failing to obtain a formal risk analysis sign-off confirming that the PHEL Review could be relied on and/or to make sufficient enquiries about the pollen milling process before granting the first permit allowing Kiwi Pollen to import kiwifruit pollen to be used commercially for the artificial pollination of kiwifruit orchards.[284]

---

282 *George v Newfoundland and Labrador*, above n 170, at [128].
283 High Court judgment, above n 2, at [843(d)].
284 At [843(e)].

[300] Negligence is the failure to take reasonable care. Once the court is satisfied that the defendant owes a duty of care to the plaintiff, the court must then ask whether the defendant acted in such a way to have breached that duty of care owed. In doing so, the court must ascertain the standard expected of the defendant and then consider whether the actions of the defendant fell short. A person with special skill and knowledge must employ the reasonable skill and knowledge of someone in that position. The test is an objective one, determined on the facts as they existed at the time. As reflected in the pleadings, the standard of care required in this case is that of a skilled and informed MAF employee undertaking functions and responsibilities in the circumstances of biosecurity in New Zealand, including functions under the Act.

[301] Mr Hodder argues that the Judge's conclusion that "MAF breached its duty of care by acts or omissions … when granting import permits to Kiwi Pollen" was wrong.[285] He submits that the findings of breach were made by only assessing the actions of the relevant MAF personnel through the distorting prism of hindsight, and not against the state of knowledge at the date of the actual conduct being challenged.

Advising Plant Imports Team

[302] In late 2006, Ms Dickson (a technical adviser in the Plant Imports Team) received an email enquiry from Kiwi Pollen regarding the proposed importation of pollen. Ms Dickson sought advice from the team leader of PEQ, Dr Clover, about the risks associated with pollen.

[303] On 23 November 2006, Ms Dickson had received the following email from Ms Hamlyn:

> Our company wishes to import frozen male kiwifruit pollen from Italy and [C]hina. Species: *Actinidia deliciosa* Var: Hayward.
>
> The pollen is collected by milling unopened male flower buds, extracting the pollen and freezing.
>
> *The pollen will be used for pollinating kiwifruit in orchards in New Zealand.*
>
> We have not imported kiwifruit pollen before.
>
> We have imported some Nashi pear pollen in the past.

---

[285] At [18].

> Please would you advise the likely time frame for obtaining a permit.
>
> (emphasis added)

[304] Ms Dickson responded indicating that MAF would advise whether the proposed import would be possible or if an assessment had to be done first.

[305] On 6 December 2006, Ms Dickson emailed Dr Clover saying:

> We have the company Kiwifruit Pollen Ltd, wanting to bring in pollen, and I know this has been discussed in the past but just can't recall how we handled it. There does not seem to have been any permit issued, but the [importer] is of the opinion that they have been allowed to in the past.
>
> Can you recall anything off the cuff? or can you give me any info about a current risk analysis.

[306] Less than half an hour later, Ms Dickson sent Dr Clover another email attaching Ms Hamlyn's email of 23 November 2006, saying:

> Further to my last email, the attached email explains a bit more of what they want.

[307] Dr Clover responded later the same day, apparently without having read the attachment to Ms Dickson's email (being Ms Hamlyn's email) and therefore unaware that Kiwi Pollen wanted to import pollen for the purpose of pollinating kiwifruit in orchards:

> …
>
> I have not heard of the company Kiwifruit Pollen Ltd but it's an interesting request and certainly pollen as a source of germplasm is likely to become increasingly important. Because of this we have recently completed an extensive literature review on pests and diseases that are associated with pollen, the report was peer-reviewed internally by Ops Stds (Tamsin) and Risk Analysis and externally by the University of Auckland. It's available on ECMS here: [link provided].
>
> *As you will see there are no pests or diseases known to be associated with pollen of Actinidia spp.*
>
> I would be happy to discuss further — please keep me informed how you decide to proceed with this permit application since it is very relevant to the PEQ GIF initiative.
>
> (emphasis added)

[308] Two days later, on 8 December 2006, Ms Dickson advised Ms Hamlyn by email:

> This matter has been discussed further within the group and it has been agreed that hand collected, unopened male flower buds of kiwifruit may be collected, milled and imported. We will be requiring that consignments be accompanied by government issued phytosanitary certificate that the male flower buds were hand collected and unopened.
>
> A permit to import will be required. As we don't have an application form exactly applicable for pollen we will use the email trail instead. Could you please confirm that the unopened flowers are milled in Italy, rather than here after arrival. …

[309] There is no record of the discussions referred to in that email. The Judge found that they likely involved Mr Hartley, a senior technical adviser in the Plant Imports Team, and Ms Cooper, team manager of the Plant Imports Team.[286] But she found that RAG was not involved at that stage and only became involved later, in relation to the unrelated applications to import apple and pear pollen.[287] This was contrary to the evidence of Dr Sathyapala, the team leader of RAG, which the Judge regarded as generally unreliable.[288] That finding is the subject of separate challenge.

[310] At trial the respondents asserted that Dr Clover was negligent in not advising Ms Dickson of the limitations of the PHEL Review — that is, that it did not assess the risks of milled pollen used for artificial pollination. The Judge agreed:

> [777] Nevertheless Dr Clover's response to Ms Dickson did misstate the conclusion about *Actinidia*. The conclusion in the PHEL Review was "[t]here are no recorded pests or pathogens that are pollen transmitted in *Actinidia* species".[289] …
>
> [778] Additionally, Dr Clover did not make it clear to Ms Dickson that the PHEL Review was about the risks of pests and diseases transmitted by pure pollen. … In other words he did not point out the narrow scope of the PHEL Review even though Ms Dickson had provided him with the email from Kiwi Pollen which said that the pollen would be used for pollinating kiwifruit in New Zealand orchards. …

---

286 At [795].

287 At [796].

288 At [567] and [646]–[647].

289 This finding was not the subject of challenge. However we note that, although Dr Clover wrongly used "associated" rather than "transmitted" in reporting the finding of the PHEL Review, this would have made no difference. The evidence was clear that technical staff within MAF would not have attributed different meanings to these words so Dr Clover's paraphrasing would not have caused confusion; whichever word was used, Ms Dickson would have treated as having the same meaning, ie pests or diseases spread by pollen.

…

> [781] … Had [Dr Clover] realised the import enquiry was for a wholly different use of pollen than was his experience it seems very likely he would have pointed this out. … Simply pointing out the report was about pure pollen (free of all contaminants) for breeding purposes would have alerted Ms Dickson that she would need to consider whether the PHEL Review conclusions could be relied on in determining Kiwi Pollen's request.

[311] On appeal, Mr Hodder argues that these findings were unsupported by the evidence and, in any event, Dr Clover was not in the Plant Imports Team and merely provided a reference to technical information which would form part of the Plant Imports Team's consideration of the Kiwi Pollen application. In that capacity he did no more than alert Ms Dickson to it, referring in broad terms to the conclusion in the *Actinidia* section which, in any event, was correct. In other words, at that point there were no pests or diseases known to be associated with pollen.

[312] We do not accept these submissions. Responding to technical enquiries from the Plant Imports Team was clearly within the scope of Dr Clover's role at PHEL and Ms Dickson was entitled to rely on the advice that she received from him. As to the correctness of the PHEL Review, this is a matter that we have, deliberately, not addressed because, for the reasons discussed, no duty of care could be owed in respect of it. For present purposes it is sufficient to say that, whilst we accept that Dr Clover accurately paraphrased the effect of the PHEL Review, we do not see any need to express a view on the correctness of that conclusion.

[313] The Judge's second finding was that, had Dr Clover realised the intended purpose of the importation, he would likely have pointed it out and Ms Dickson would have been alert to the possibility that the PHEL Review was insufficient to determine the application for the import permit. The finding rested on a passage of cross-examination which was set out in the judgment.[290] Dr Clover was asked what he would have said to Ms Dickson if he had understood she was enquiring about milled pollen from Italy and China to be used commercially for artificial pollination. He said:

---

[290] High Court judgment, above n 2, at [780].

> As this is pure speculation now and trying to cast my mind back to 2006 I think it's quite possible I would have asked what milling involved but I think I would be very much aware about my role in this which was I was working in the laboratory and it wasn't my role to set import requirements. So I would have referred [Ms Dickson], as I did, to the review that we'd done. Knowing that this is talking about milling unopened male flower buds and it talks about pollinating kiwifruit in orchards, I speculate that I would have referred [Ms Dickson] to the introduction in that report which talked about importation for germplasm, but that is speculation.

[314] Mr Hodder argues that this finding was speculative and therefore unsupportable. We disagree. The fact that Dr Clover himself regarded the answer as speculation did not preclude the Judge from taking a broad view of the evidence to reach a conclusion that, more likely than not, he would have offered that additional information. It is apparent from Dr Clover's response to Ms Dickson on 6 December 2006 that he was making an assumption that the request related to the importation of germplasm (for breeding). In the circumstances, and given the Judge's advantage of assessing Dr Clover in person, we see no error in the conclusion she reached on this point.

[315] Nor do we see any merit in the submission that, merely because no hazards were identified in the *Actinidia* section of the PHEL Review, the end use (commercial artificial pollination as opposed to breeding) was irrelevant. The importation of pollen was an uncommon event for MAF at that time and this request was particularly unusual. A scientist in Dr Clover's situation could reasonably have been expected to respond to the request as it was put; that could only be done by drawing to Ms Dickson's attention the fact that the use of imported pollen for artificial pollination on a commercial scale had not been contemplated when the PHEL Review was carried out.

[316] It is evident from the Judge's findings that she was conscious of how busy Dr Clover was at the time; indeed it is clear from the evidence of a number of witnesses that many MAF staff were over-burdened. One can therefore understand the inattention that led Dr Clover to respond to Ms Dickson's enquiry without opening the email attachment. But we agree with the Judge's conclusion that, even allowing for that, the failure to do so fell below the expected standard of care.

Failure to undertake risk assessment

The risk assessment process

[317] Risk assessment is part of the process known as risk analysis, which comprises hazard identification, risk assessment, risk management and risk communication and documentation. We are concerned with hazard identification and risk assessment. Risk analysis may be undertaken in respect of particular commodities or particular pests or diseases or a particular exporting country or trading block. In 2006 a formal procedure developed by Dr Ormsby, a senior adviser in RAG, the Risk Analysis Procedures,[291] was in place. It described hazard identification and risk assessment as follows:

> *Hazard identification* is an essential step that must be conducted prior to a risk assessment. To effectively manage the risks associated with pathways or imported risk goods, organisms or diseases which could be introduced into New Zealand that are capable of, or potentially capable of, causing unwanted harm must be identified. In the case of a single hazard, a pest risk analysis, all or many of the potential pathways of entry may be identified.
>
> In the *risk assessment* step the risk analyst evaluates the likelihood and environmental, economic, and human health consequences of the entry, exposure and establishment of a potential hazard within New Zealand. The aim is to identify hazards which present an unacceptable level of risk, for which risk management measures are required. A risk assessment consists of four inter-related steps:
>
> i) Assessment of likelihood of entry
>
> ii) Assessment of likelihood of exposure and establishment
>
> iii) Assessment of consequences
>
> iv) Risk estimation.

[318] Even in the context of that formal framework, however, there was no fixed format for a risk assessment. So, although issuing an import permit inevitably required risk assessment, the approach taken in any given case was determined by a triaging process. Dr Butcher compared, by way of example, a commodity that had been imported before, for which risk management measures were well understood and there was no change in the known risk, with a commodity not previously imported. In the former, an import permit could safely be issued without further action. In the latter,

---

[291] See above at [278], n 264.

if known information indicated that there were no particular risks the permit might either be issued or a risk assessment be undertaken. That risk assessment could be an informal discussion between experts or a fully published document, depending on the circumstances.

The issue on appeal

[319] The respondents had said that the Plant Imports Team should not have allowed the import of kiwifruit pollen without first obtaining a full risk assessment, which would include the involvement of RAG.

[320] The Judge's finding as to what steps should have been taken rested on Dr Ormsby's evidence, which the Judge summarised in the following passage:

> [806] Dr Ormsby said that if RAG had been asked to do a hazard identification for kiwifruit pollen, how they would approach it would depend on how urgent it was and what question they were being asked to answer. They would do a literature review encompassing pollen generally and go on to consider whether bacteria associated with *Actinidia* presented a potential risk or hazard. This would have led them to consider Psa because it was on the pest list. If a pathway included plant material, then they would consider the risks associated with this. If pollen was intended for commercial application then PEQ was not practical although it would be possible to take a small sample for testing.

[321] The Judge then concluded that:

> [810] Dr Ormsby's evidence sets out what should have occurred. Unfortunately it did not. Kiwi Pollen's import request was not considered as it should have been. While there is no requirement for a risk analysis to take a particular form, the nature of the application — involving the import of pollen of an important horticultural crop, PEQ was required for budwood of that crop, there had been no risk analysis when the Nursery Stock IHS was issued, and the request was for a new use (commercial application in orchards) — meant that it should have been referred to RAG for a full assessment, rather than for sign off of the hazard identification contained in the PHEL Review (or Card Paper). That was the approach taken when Kiwi Pollen's vacuum collected pollen was proposed. Had it been understood that the PHEL Review related only to pests and diseases transmitted by pure pollen used for breeding purposes the same approach would have been taken with Kiwi Pollen's proposal to import pollen from hand collected closed flower buds.

[322] The Judge specifically identified the following failings by the Plant Imports Team.[292] First, in December 2006 one or more of Ms Dickson, Mr Hartley and Ms Cooper relied on the PHEL Review as though it was a risk analysis for pollen. Secondly, they uncritically accepted Dr Clover's advice that there were no known pests or diseases associated with pollen and/or the statements in the PHEL Review that there were no recorded pests or pathogens that were pollen transmitted in the *Actinidia* genus. And thirdly, in April 2007 when the first Kiwi Pollen permit was issued, Mr Baring, Mr Hartley and possibly Ms Cooper relied on Dr Sathyapala's "sign off" of the PHEL Review (given in the context of the contemporaneous applications for apple and pear pollen) with the result that no consideration was given to how the kiwifruit pollen was produced and whether it could include plant parts or other contaminants. The Judge considered that if these issues had been thought about the Plant Imports Team or RAG would have likely realised that pollen came with plant parts and therefore, because Psa was a known pest for *Actinidia*, additional measures would need to have been considered.

[323] Mr Hodder argues that these conclusions were based on hindsight and on an erroneous analysis of the relevant decision-making and its context. He submits that most of the Judge's criticisms related to the triaging decision not to request a full risk analysis from RAG and failed to properly reflect the nature of the triage process, both generally and in relation to the particular circumstances that existed in this case in 2006. This involves a direct challenge to the Judge's factual finding that RAG had not been involved in the decision to grant the 2007 Kiwi Pollen permit and the Judge's rejection of Dr Sathyapala's evidence.

[324] For the reasons that follow, we would have concluded that, although the Judge did make some errors in her assessment of the evidence regarding the decision to grant the 2007 permit, those errors did not undermine her ultimate conclusion that there had been a lack of reasonable care in the granting of the 2009 permit which renewed the 2007 permit.

---

[292] High Court judgment, above n 2, at [811].

RAG's involvement in the decision

[325] The Judge found that more likely than not RAG was not involved in the discussion (referred in to Ms Dickson's email to Kiwi Pollen on 8 December 2006) in which it was agreed that Kiwi Pollen's application to import pollen should be granted.[293] The Judge found that RAG was not involved until March 2007, and only then as a result of the entirely unrelated application to import apple and pear pollen.[294] The reasons the Judge gave for her conclusions were that:[295]

(a) Ms Dickson did not recall involving RAG;

(b) the Judge considered that Mr Hartley was doing no more than guessing when he identified those likely to have been involved in the discussion;

(c) Mr Baring, who was not involved in the Kiwi Pollen application, had sought RAG sign-off in relation to the applications to import apple and pear pollen in early 2007;

(d) there was no email record of contact with RAG in December 2006 whereas there were emails showing RAG's involvement in March and April 2007; and

(e) Dr Sathyapala had been concerned about relying on the PHEL Review because it was not work that had been carried out by RAG and a further peer review was required before signing it off for use in risk analysis. If RAG had been involved in the December 2006 application in which

---

293 At [796].

294 This application was made in February 2007 and related to the import of pollen for commercial application. Dr Sathyapala was asked for her "sign off" of the PHEL Review so that it could be used in determining the applications. She would not give that without further review by members of RAG. A senior analyst in RAG, Dr Zhu, reviewed the part of the PHEL Review relating to *Malus* and *Pyrus*. Dr Sathyapala reviewed Dr Zhu's comments and those of Professor Pearson and discussed them with the other RAG members before approving the PHEL Review for use in drafting measures for import permits. In an email to Dr Clover dated 13 April 2007 Mr Baring noted that Dr Sathyapala had "given 'sign-off' in the form of an e-mail stating that [RAG] are happy that [the Plant Imports Team] utilise information contained within document to draft corresponding measures".

295 High Court judgment, above n 2, at [796].

> reliance was placed on the PHEL Review one could have expected the same response if she had known of the application.

[326] As noted above at [323], Mr Hodder argues that these findings were against the weight of the evidence and failed to acknowledge the nature of the "triaging" decision that led to the first import permit being granted without a full risk assessment being undertaken. In particular, Mr Hodder submits that the Judge's finding was contrary to Dr Sathyapala's evidence that there were "almost daily" discussions between the Plant Imports Team and RAG. We accept these submissions.

[327] The Judge found that when Dr Sathyapala signed off the PHEL Review in January 2007 in the context of the apple and pear applications she had been unaware of the Kiwi Pollen application approved in December 2006 (even though Dr Sathyapala had said that she was aware of it). This led to the conclusion that RAG was not involved in the importation of pollen until March 2007 (and only then in relation to the apple and pear applications) and that Dr Sathyapala was not aware of the kiwifruit pollen imports in any specific way. But Dr Sathyapala's evidence was that she discussed Kiwi Pollen's request to import kiwifruit pollen with members of the Plant Imports Team (Ms Cooper and possibly Mr Gower-Collins, a group manager) and within her own team, particularly with Dr Ormsby. She said that she recalled discussing the fact that the pollen was to be used for artificial pollination and the option of requiring hand-picked unopened flower buds but could not recall who suggested that. This evidence was strongly challenged.

[328] The Judge rejected Dr Sathyapala's evidence. In a footnote, the Judge explained:[296]

> Generally I did not find Dr Sathyapala's recollections to be reliable: she tended to assert she could remember the content of discussions which took place around eight to ten years ago, and who these discussion were with, in a way that none of the other witnesses did. … In some of her answers she would assert things with some conviction but then resile from them when presented with evidence that was contradictory. … In saying this I did not regard Dr Sathyapala as dishonest in any way whatsoever. She was doing her best to give accurate evidence in difficult circumstances. She no longer works for MAF. She lives in Rome and has a busy role requiring frequent international travel. She gave her evidence via AVL late at night (Rome time). These events

[296] At [821], n 462.

> were a long time ago and she was implicated in the plaintiffs' claim because she had given "sign off" to using the PHEL Review. She appeared to accept her involvement in some matters because she was clearly involved in other matters and because, had things been carried out properly, she would have been involved.

[329] Care is required before interfering with a trial judge's finding of this kind. However, a review of the evidence given by the witnesses in the Plant Imports Team and RAG suggests that, in assessing Dr Sathyapala's reliability, the Judge did not give adequate weight to evidence that was consistent with Dr Sathyapala's recollection and to evidence about the dynamics between the Plant Imports Team and RAG. Because our view about Dr Sathyapala's evidence does not affect the Judge's ultimate conclusion, it is unnecessary to record the detailed analysis of the evidence that led to this view. We briefly summarise the significant aspects of the evidence.

[330] The evidence was that issuing an import permit required signing authority. In the early 2000s, signing authority was held by the team manager and later certain senior advisers. None of the Plant Imports Team members who gave evidence (Ms Dickson, Mr Hartley and Mr Baring) said that they had signing authority.

[331] Ms Dickson had very limited recollection of the events leading up to the issuing of the permit. She did not recall who had been party to the discussion referred to in her email sent to Ms Hamlyn on 8 December 2006 nor whose idea it was that the collection of pollen be by hand and of unopened male flower buds. She thought that Mr Hartley and probably Ms Cooper, the team leader, and very likely another senior adviser would have been involved. She did not recall speaking to Dr Sathyapala or Dr Ormsby, though she added that this did not mean to say she had not done so. Notably, she commented that "Susan Cooper in her position may have wished to seek advice from above herself".

[332] Mr Hartley, who had only moved to the Plant Imports Team as a senior adviser in late 2006, worked alongside Mr Baring and Ms Dickson, and reported to Ms Cooper. He did not say that he had signing authority in respect of import permits. He did not recall the meeting referred to in Ms Dickson's email sent on 8 December 2006 but presumed that he had been present, along with Ms Dickson, "possibly" Chris Baring and Dr Sathyapala, and "more than likely the team manager, if not the group manager"

on the basis that this type of decision was made collectively with input across the teams. The Judge dismissed Mr Hartley's evidence, saying that:[297]

> … Mr Hartley was doing no more than guessing as to who might have been involved and accepting propositions put to him but not in a convincing way. He thought Dr Sathyapala would have been involved because it required her sign off. Because it was kiwifruit and MAF was quite hierarchical he thought it would have also gone to a team leader or a group manager. The evidence does not support the involvement of Mr Gower-Collins or Dr Butcher (at group manager level).

[333] Mr Baring had moved to the Plant Imports Team as a senior adviser in 2006, shortly after Mr Hartley. He was not involved in the Kiwi Pollen application in December 2006 but gave evidence of a general nature about how the Plant Imports Team worked. In particular, the team worked in an open plan environment with communications mostly by way of casual conversation rather than email. There was a weekly team meeting where the team talked about "big things that had come up that [the team] might want to discuss" but there were casual conversations about things that could not wait for a week. In terms of the process for dealing with an import permit application, Mr Baring said he would have talked to senior members of RAG, probably Dr Ormsby. But he said the Plant Imports Teams "would have talked with Gerard Clover as well. He had previously been the manager of the Plant Imports Team, so … we used him a lot 'cos he had only just left." Mr Baring also mentioned Dr Sathyapala.

[334] The Judge's finding as to the discussions at which it was agreed that the Kiwi Pollen application would be approved and on what conditions essentially came down to just Mr Hartley and Ms Cooper:

> [795] In my view it is likely that Mr Hartley was involved in the discussions on 8 and 12 December 2006 where the Kiwi Pollen request was considered. He was a senior adviser in Ms Dickson's team. He had been copied into the email and his calendar had blocked out one hour titled "pollen" for 8 December 2006. It is also likely the meeting involved Ms Cooper who was the team manager who would be signing off the permit. And Ms Cooper had been involved in the earlier discussions with Dr Sathyapala and Dr Herrera about importing pollen into PEQ.

---

297 At [796(e)].

[335] In our view, these findings stop short of addressing the critical question: who actually decided to allow the Kiwi Pollen application and what conditions should have been imposed? Although it could have been Ms Cooper, it seems unlikely that she would have made that decision without input from RAG.[298]

[336] First, although Ms Cooper (as team leader) was responsible for signing off the Kiwi Pollen import permit on 16 April 2007, she was new to MAF, having only arrived in 2006. Despite the MAF hierarchy, it was clear that staff tended to seek out advice from those whose knowledge and skills they had regard for, even if not on the same team. For example, several MAF witnesses referred to the knowledge and skills of Dr Clover and Dr Ormsby, even though they were not in the same team. But no such comments were made about Ms Cooper. In that context, Ms Dickson's observation that Ms Cooper may have wanted to seek advice from someone above her in relation to the Kiwi Pollen application was telling. The Kiwi Pollen application was very unusual because the proposed importation was to be used for commercial artificial pollination. It seems unlikely that a new team leader would make a decision on such an unusual application without seeking the advice of others with more knowledge. Significantly, Dr Sathyapala had seen at least one previous application to import pollen for use in artificial pollination.[299] In 2005 HortResearch contacted the Plant Imports Team about importing kiwifruit pollen for commercial artificial pollination. The senior adviser handling the enquiry discussed it with Dr Sathyapala. HortResearch was advised that level three PEQ would be required. To Dr Sathyapala's knowledge the application was not pursued.

[337] Secondly, it is clear from Mr Baring's and Mr Hartley's evidence that there was a good deal of informal communication between the Plant Imports Team and RAG as a result of their close physical proximity and the fact that decisions tended to be made collectively with input from across the teams.

[338] Thirdly, the reality was that the decision was one that could not, in fact, have been made without some input from RAG. All those in PHEL, the Plant Imports Team

---

[298] It appeared Ms Cooper had returned to Australia after leaving MAF and there was no suggestion that any adverse inference was to be drawn from the fact that she did not give evidence.

[299] See above at [29].

and RAG understood the complementary roles they played in the decision-making process. All understood that hazard identification was the province of RAG. At that stage the PHEL Review was not widely known (evident from the fact that Dr Clover had to provide the link to Ms Dickson) and, in any event, did not purport to represent a risk analysis but simply an aid to risk analysis. The importance of the kiwifruit industry, the unusual nature of the Kiwi Pollen application and the relative inexperience of the Plant Imports Team suggests that it was more likely than not that Ms Cooper consulted with Dr Sathyapala (and possibly Dr Ormsby) regarding the Kiwi Pollen application. Although Dr Ormsby did not recall being involved, Dr Sathyapala did.

[339] In our view the weight of the evidence should have led to a finding that Dr Sathyapala had likely been involved in the assessment of the Kiwi Pollen application. This would lead to a finding that RAG was likely involved in the Kiwi Pollen application on the basis of an informal risk assessment.

[340] Mr Hodder's position is that an informal assessment was appropriate in the circumstances and was a decision involving judgment in which other factors, including resourcing, were relevant considerations.[300] Further, the Plant Imports Team was required to comply with the SPS Agreement in assessing the application so that phytosanitary measures imposed had to be both technically justified by sufficient scientific evidence and proportionate to the risk. The evidence was that a full, formal, risk assessment required significant resources and time. The demand for such assessments meant that such work was prioritised by way of a yearly work plan. Dr Butcher considered that a review of pollen imports from China would have taken more than two years to complete because of the lack of technical knowledge and information and the need to access information from China. He thought it unlikely that a formal risk assessment would have been prioritised because the available information indicated a low risk compared to other imports, such as other types of nursery stock and fruit, which were regarded as being of higher and known risk.

---

[300] This assumes that this decision was actually justiciable, which the Crown does not accept. See above at [167]–[191].

[341] It is notable, too, that Dr Ormsby, whose evidence as to what should have been done the Judge accepted and relied on, described an informal process when explaining what he considered ought to have happened. Although the Judge was right to identify features of the Kiwi Pollen application that justified a careful risk assessment, on the basis of Dr Ormsby's evidence, that could have been achieved through the informal process that was adopted. The real issue is whether any informal assessment undertaken was carried out with reasonable care in all the circumstances. In our view, the evidence shows that it was not.

[342] Dr Sathyapala said, in relation to the assessment, that because the PHEL Review had not identified any hazard in the form of organisms associated with kiwifruit they could not go further in terms of risk analysis but could, and did, consider the uncertainties associated with the proposed importation. Consideration of the uncertainties led to the conditions that were imposed. However, it is evident that the critical uncertainty was not properly identified — that is, the risk of other plant material being imported along with the pollen.

[343] The respondents point out that Psa was a known pest associated with kiwifruit, that a relevant MAF data sheet identified it affecting flowers and other plant parts, and that it is usually introduced into new regions through infected nursery material. If there was any risk of plant material other than pure pollen reaching New Zealand through the importation of pollen, there was an obvious risk of Psa infection. Such a risk clearly existed because it was possible for other plant parts to be milled along with pollen or otherwise enter the country with the pollen. Given the importance of kiwifruit to New Zealand, the novelty of the proposed importation and the known association of Psa with kiwifruit plant material it is difficult to think that there could be any serious objection under the SPS Agreement to a precautionary approach being taken to the importation of milled pollen.

[344] Therefore, we consider that although an adequate risk assessment could have been undertaken informally, it required the Plant Imports Team and RAG to have significant knowledge about the proposed importation to do so.

[345] Although the application outlined the manufacturing process, it is clear that the Plant Imports Team lacked a sufficient understanding of the process to make an adequate assessment of it.[301] Ms Dickson, who handled the application, did not know how kiwifruit pollen was milled and did not know that, in practice, pollen was unlikely to be "pure". The Judge recorded this aspect of the evidence:

> [789] [Ms Dickson] thought that milling flowers would involve breaking the flowers into quite small pieces, probably drying it and separating pollen from the rest of the milled material but "I can't say for sure because I actually don't know". Whether it could come with live bacteria was a technical question she "wouldn't really like to answer". She said that if the senior advisor, Mr Hartley, did not know, then advice from PHEL would probably be sought.

[346] Likewise, Mr Hartley thought that milling would probably remove extraneous material and thought that requiring milling to be done overseas would reduce the risk of contamination from such material.

[347] The Judge concluded:

> [817] In summary, the MAF personnel involved in deciding on the conditions on which Kiwi Pollen imports would be approved (in December 2006 and April 2007) did not take the care that reasonably was to be expected of them in the circumstances they were in. I appreciate they were busy and understaffed. However there was no pressing urgency to respond to Kiwi Pollen's request. The proper response was that which Mr Baring gave when Kiwi Pollen's proposal to import vacuum-collected pollen was raised. …
>
> [818] The failure to take reasonable care involved failing to identify the need for consultation on Kiwi Pollen's request, or otherwise obtaining more information about clarifying the pollen milling process. It also involved not obtaining formal confirmation from RAG in December 2006 that the PHEL Review could be relied upon for Kiwi Pollen's import request. …

[348] Mr Hodder criticises this finding on the ground that the failure to ask the right questions about the milling process effectively amounts to negligent information gathering by a government agency, which is not actionable. This submission relied on the decisions in *Adams v Borrel* and *George v Newfoundland and Labrador*,[302] both of which we have already discussed in the context of the PHEL Review. However, those

---

301 The 2007 Kiwi Pollen application stated "[c]losed male flower buds are harvested, macerated, dried, and the pollen extracted by machine, then stored at minus 18 degrees [Celsius]".

302 *Adams v Borrel*, above n 275, at [73]; and *George v Newfoundland and Labrador*, above n 170, at [128].

cases concerned the very different situations of policy decisions being made based on information that (allegedly) had been gathered negligently (*Adams*) and inadequate research (*George*). As we have already concluded, the decision regarding the terms on which a specific import permit application will be granted is an operational one.[303] The failure to obtain the necessary information to make an informed decision does not fall within the scope of general information gathering of the kind discussed in *Adams* and *George*.

Conclusion on breach

[349] We would have held that overall the Judge was correct in her findings that, had MAF owed a duty of care to the respondents, the relevant MAF personnel acted in breach of the alleged duty by granting the import permits to Kiwi Pollen on the basis of their consideration of the 2007 Kiwi Pollen application.

[350] Specifically, the Judge was entitled to find that Dr Clover fell below the requisite standard of care when he responded to Ms Dickson's enquiry about the Kiwi Pollen application.

[351] Secondly, although the Judge's conclusion that RAG had not been involved in the decision to grant the initial Kiwi Pollen import permit was against the weight of the evidence and nor did the evidence support a finding that a full risk assessment was required, we would have agreed with the Judge's overall conclusion that members of the Plant Imports Team breached their duty of care by failing to undertake an effective (albeit informal) risk assessment in relation to this unusual import permit application.

Issue 3(c): Did the High Court err in holding that the acts or omissions at the pre-border stage caused the clearance and release of the June 2009 consignment?

[352] A defendant who is in breach of a duty in tort cannot be held responsible for a loss suffered by the plaintiff unless it is proven that the defendant's conduct was a cause of that loss.[304]

---

303 See above at [189].
304 Todd, above n 98, at 1100.

[353] The respondents assert that, but for the negligence of the MAF personnel, the import permit for the June 2009 consignment would not have been granted.[305]

[354] Although Issue 3(c) reflects the parties' agreed list of issues dated 13 March 2019, the Crown's real complaint is that the Judge failed to make a specific finding on this issue. It frames the question as being: "Did the High Court err in (apparently) holding that the acts or omissions [at the pre-border stage] caused the clearance and release of the June 2009 consignment?"

[355] At trial the Crown adduced evidence that the accepted approach in determining applications for import permits was to treat them consistently with previous applications, subject to any changes having occurred in the intervening period. Given the state of scientific knowledge in both 2007 and 2009, that meant there was insufficient evidence to justify refusing the 2009 permit because the SPS Agreement required positive evidence of a probable risk. The Crown maintained that import permits for kiwifruit pollen from China between 2007 and 2009 could only have been refused if MAF could demonstrate that Psa was present in China, was associated with hand-collected kiwifruit pollen, could survive the milling process and would be exposed or transmitted to kiwifruit vines following importation. The Crown argued that none of these facts was known before 2010. Therefore, it could not be said that issuing the 2009 permit resulted from any negligence on the part of MAF or its staff; the permit would have been issued in any event.

[356] The Judge recorded this submission early in the judgment but did not reach a conclusion on it and did not refer to it during her discussion on causation. We agree that it should have been addressed specifically. However, there is no merit in the argument because in our view the contest was not between the application being granted or refused, but whether the importation should have been required to undergo PEQ. We previously noted that, although PEQ was a mandatory requirement for nursery stock, MAF personnel erroneously assumed that in respect of pollen they had the power to issue import permits which did not contain a PEQ requirement.[306]

---

[305] The respondents also assert that Psa3 entered New Zealand with the June 2009 consignment, an issue that we deal with separately.

[306] See above at [62]–[64].

Prior to the reconsideration of PEQ for pollen that led to the PHEL Review, MAF personnel had consistently required the inclusion in import permits of special conditions that pollen undergo PEQ. However when the 2007 and 2009 permits were issued the effect of the PHEL Review was understood to indicate that pollen could safely be imported without a period of quarantine. Consequently MAF personnel then proceeded on the footing that specific conditions for PEQ were not required to be included in import permits. Nevertheless we consider that had the Plant Imports Team adequately informed itself about the nature of the milling process and the intended commercial use of pollen by Kiwi Pollen in undertaking a risk assessment, it is highly likely they would have reverted to the previous practice of requiring PEQ and imposed a specific quarantine requirement in the import permits.

[357] We would have found that, but for the breach of duty by MAF personnel outlined above, the 2009 permit to import pollen would not have been granted on the terms it was. In other words, had MAF exercised reasonable care in considering the Kiwi Pollen application, it is more likely than not that any permit granted would have incorporated an express condition requiring some level of PEQ that would have, in turn, detected the presence of the Psa3 virus (assuming the June 2009 consignment was infected with Psa3). It is therefore untenable to say that MAF had no choice but to grant the 2009 permit on the terms it did, nor that the granting of the permit did not cause the loss alleged. The evidence was that for Hort16A kiwifruit the time from infection to symptom could be as little as a week. Had the pollen been quarantined it can reasonably have been expected that symptoms would have been visible before its release.

Issue 3(d): Did the High Court err in holding that MAF personnel did not breach their duty of care in (1) failing to impose a condition requiring microscopic inspection; (2) permitting pollen to be "milled prior to import"; and (3) failing to consider the risk posed by kiwifruit pollen imports following the Italian outbreak of Psa3 and/or finding that such breaches did not cause the clearance and release of the June 2009 consignment?

[358] These issues are raised by the respondents in support of the judgment on other grounds.

Microscopic inspection condition

[359] The decision made in late 2006 to approve Kiwi Pollen's first application to import kiwifruit pollen was on the basis that the conditions for import would require that the pollen be "microscopically inspected and found free of regulated organisms".[307] However, neither the import permit issued on 16 April 2007 nor any subsequent permit, including the 2009 permit under which the June 2009 consignment was imported, contained this condition.

[360] The fact that the condition would be imposed had been recorded in an email from Ms Dickson to Ms Hamlyn on 12 December 2006. Ms Dickson, who was originally responsible for preparation of the 2007 permit, had handed that task over to Mr Baring in early 2007. However, although Ms Dickson was reasonably confident that she would have passed that email to Mr Baring, Mr Baring did not recall seeing it. The respondents allege that Mr Hartley, the senior adviser for Nursery Stock, including pollen, and Ms Cooper, the team leader of the Plant Imports Team (who did not give evidence) were negligent in failing to ensure that the 2007 import permit included the agreed condition. They also allege negligence by either Ms Dickson in failing to draw the microscopic inspection condition to Mr Baring's attention or Mr Baring for failing to include it in the draft permit he prepared.

[361] The Judge held that the microscopic inspection condition was intended to address contamination risks such as contamination by insects though it was not clear whether anyone had actually thought about the contamination risk from plant parts or had any particular contaminants in mind.[308] The Judge found that, most likely, a mistake in the handover or documentary record keeping was the reason for the condition not being included in the permit.[309] However, the error had no causative effect:[310]

---

307 As stated in the email referred to below at [360].
308 High Court judgment, above n 2, at [825].
309 At [826].
310 At [827].

> … because it would be speculative to say what would have happened if the condition had been included. There was no evidence from the Chinese authorities about how they would have approached providing the necessary declaration had the microscopic testing condition still been retained by the time the permit pursuant to which the anthers consignment was issued. At that time the permit stated that "the pollen may be milled prior to import". There was evidence from Ms Hamlyn that anthers were traded. The Chinese authorities may well have been unconcerned that they were testing anthers rather than milled pollen. Lastly, there was no evidence about whether Chinese microscopic testing would have detected Psa.

[362] The weight of the evidence was that microscopic inspection in 2007–2009 would not have detected Psa. But the respondents argue that the negligent omission of the microscopic inspection condition was, nevertheless, causative of their loss because:

(a) microscopic inspection would have identified that the June 2009 consignment contained unrefined anthers, not pollen;

(b) one of the purposes of microscopic inspection was to identify extraneous material that might contain vector regulated organisms so it did not matter that microscopic inspection would not have identified Psa; and

(c) the 2009 permit was for pollen and it is much more likely than not that the Chinese authorities would have identified that the contents were anthers, not pollen and either declined to give the required declaration or sought confirmation from MAF as to how to proceed.

[363] The flaw in these arguments is that the only relevant characteristic of the June 2009 consignment that could have been identified was the fact that it contained anthers, not unmilled pollen. That, however, would have been apparent from an ordinary visual examination and the phytosanitary certificate confirmed that the June 2009 consignment had been inspected. Since it was cleared for export in China there is simply no basis for suggesting that a condition requiring microscopic inspection would have led to a different result.

The revised wording of the import permit

[364] The respondents' alternative argument is that the wording of the special conditions in the 2009 import permit led to the Chinese authorities' decision to allow the export of the anthers.

[365] When Kiwi Pollen first approached MAF signalling its wish to import frozen kiwifruit pollen Ms Hamlyn advised that the pollen would be "collected by milling unopened male flower buds, extracting the pollen and freezing". Following the discussions within the Plant Imports Team and RAG Ms Dickson advised Ms Hamlyn that:

> … it has been agreed that hand collected, unopened male flower buds of kiwifruit may be collected, milled and imported. … Could you please confirm that the unopened flowers are milled in Italy, rather than here after arrival.

[366] Ms Hamlyn responded, requesting confirmation that MAF's approval for the importing of kiwifruit pollen applied to China as well as Italy and advised:

> To clarify about the location of the milling: the flower buds must be milled within 18 hours of harvesting, therefore they are always milled in the location they are harvested, and the pollen processed there.

[367] A few days later Ms Dickson advised Ms Hamlyn that MAF would also require a declaration on the phytosanitary certificate that:

> (1) The milled pollen has been sourced from hand collected, unopened male flowers.
>
> (2) The pollen has been microscopically inspected and found free of regulated organisms.

[368] The permit, granted on 16 April 2007, contained the following special conditions:

> Only hand collected, unopened male flower buds may be collected, milled and imported.
>
> Consignments must be accompanied by a government issued phytosanitary certificate stating that the male flower buds were hand collected and unopened.

[369] In a subsequent permit issued on 3 November 2008 for the importation of pollen from Chile, however, the wording of the special conditions changed and that change was carried through to the subject permit issued on 30 April 2009. The amended conditions required:

> (1) Unopened male flower buds must be hand collected. The pollen may be milled prior to import.
>
> (2) All consignments must be accompanied by a phytosanitary certificate issued by the National Plant Protection Organisation of the exporting country with the following Additional Declaration:
>
> "The male flower buds were hand collected and unopened."

[370] The evidence failed to identify the reason for the change. The MAF staff who had signed the 3 November 2008 and 30 April 2009 permits could not recall how the change in conditions came to be implemented.[311]

[371] The respondents argue that if the change in wording introduced an ambiguity as to the terms on which the pollen could be imported (conveying that pollen on anthers could be imported as well as milled pollen) such that the Chinese authorities would not have been concerned that they were testing anthers, then the amendment was causative of their loss.

[372] The Judge found that the change did lead to ambiguity because, although a person reading it "would probably conclude the import was for pollen and not anthers … that is by no means certain because 'may' does not usually mean 'must' … and anthers do contain unmilled pollen".[312] However the Judge did not accept that this failing had any causative significance because there was no evidence that the wording had caused the exporter to be confused, rather "[m]ore likely there was a misunderstanding between Kiwi Pollen and its Japanese business associate helping with the importation on the one hand and the Chinese orchardist on the other."[313]

---

311 The authorising officer of the 2009 permit did not give evidence. However Ms Campbell, a nursery stock adviser in the Plant Imports Team, countersigned the permit and gave evidence to this effect.

312 High Court judgment, above n 2, at [830].

313 At [831].

[373] The Crown submits that, not only was the Judge correct to find that the evidence did not show a likelihood of the exporter being confused by the wording but, even if there was confusion, Ms Hamlyn could reasonably have been expected to be the first point of call and was well aware that the permit was for pollen only.

[374] The Judge's rejection of the respondents' argument (and necessarily the Crown's submission on appeal) does not seem to address the point being made. The pleading and, seemingly, the respondents' case at trial did not focus on the exporter. The complaint was that the terms of the 2009 permit allowed anthers rather than milled pollen to be certified as required and cleared for import to New Zealand. Whether or not Ms Hamlyn understood that the 2009 permit was for pollen only rather than anthers was unlikely to make any difference; self-evidently the Chinese authorities regarded anthers as falling within the scope of the 2009 permit and the evidence does not suggest Ms Hamlyn was contacted for clarification.

[375] We would have accepted the respondents' assertion that the 2007 permit was granted specifically on the basis of the pollen being milled prior to import and, although the original wording reflected that requirement, the later wording did not. Instead, the new wording conveyed that the pollen could be milled following export from China. Given that some types of pollen, such as pear, were typically exported unmilled (described as "rough pollen") the distinction was real.

[376] There was evidence from the New Zealand inspector that milled and unmilled pollen could be distinguished on visual identification. The respondents' argument is that, because the Chinese authorities would have inspected the June 2009 consignment for the purposes of providing the phytosanitary certificate, the consignment would have been refused clearance for export at the Chinese border if the correct wording had been used. However, as the Crown argues, there was no evidential support for this. It was a finding invited solely on the assumption of what the Chinese authorities would have done. In the absence of evidence as to that, there was an insufficient basis to draw such an inference.

Response to the Italian outbreak

[377] The respondents had asserted at trial that MAF personnel were aware or ought to have been aware of the Italian outbreak from an early stage and ought to have done more to respond to the risk of Psa entering New Zealand. Specifically, a pest risk assessment for Psa should have been initiated and kiwifruit imports stopped by July 2009; had that been done the June 2009 consignment would not have entered New Zealand or, at least, would have been located at Kiwi Pollen's premises before it could be used.

[378] The Judge found that mistakes were made by MAF personnel in responding to the Italian Psa incursion but they were not negligent mistakes by any individual. Rather "with the benefit of hindsight, it can be seen that more could have been done in 2009 and 2010 and, if it had been, there was a chance the June 2009 anthers consignment would not have set in train one or more of the pathways [to infection]".[314] The respondents challenge that finding.

[379] The respondents rely on the fact that Dr Sathyapala was aware that kiwifruit pollen was being imported into New Zealand coupled with her knowledge about the Italian incursion (by October 2008 she was aware of the situation in Italy and by July 2009 of the extent of the devastation there). It is said that, as team leader of RAG, she had the responsibility for initiating a pest risk assessment, that doing so was not onerous and that it would have identified immediately that pollen was the only potential pathway for Psa to enter New Zealand. They point to MAF's risk analysis procedures which specifically required a pest risk analysis where "an established infestation or an outbreak of a new organism or disease is discovered within an exporting country or area". They say that the failure to do so was negligent.

[380] We agree with the Crown that these propositions are the product of hindsight and lack a sufficient evidential foundation. There is no basis for concluding that, on the information she had at that time, Dr Sathyapala was required to take specific steps to halt the importation of pollen.

---

314 At [843].

[381] The June 2009 consignment was cleared at the border on 30 June 2009 and released to Kiwi Pollen's freight forwarders that day. The evidence was not clear as to when it was processed. Ms Hamlyn said that she put the June 2009 consignment in the freezer and could not recall when it was processed, though in cross-examination recalled that had been done before the end of winter. That would mean by the end of August 2009.

[382] The respondents rely, first, on communications between Dr Vanneste, a senior scientist at Plant & Food Research, and Dr Sathyapala in October 2008. In a phone and subsequent email conversation between Dr Vanneste and Dr Sathyapala, Dr Vanneste explained that he had been asked to find information about the economic impact on New Zealand's kiwifruit trade in the event of Psa being present in New Zealand and asked for any information that MAF had that might assist. But Dr Vanneste's interest in Psa in late 2008 was focused on work that he had been undertaking for over a year towards developing a diagnostic tool for the identification of different pathovars including Psa. Dr Sathyapala asked Ms Crook (a technical adviser with RAG) to check what information MAF held on Psa and whether a separate risk assessment had been undertaken on it. The response was to confirm that there would be serious consequences for New Zealand in the event of Psa being found here. Information about it was provided, with potential entry pathways identified as being tissue culture, budwood and cuttings. The Judge did not consider that the contact between Dr Vanneste and Dr Sathyapala in October 2008 justified Dr Sathyapala doing anything specific at that time.[315] We see no error in that finding.

[383] Between April and July 2009 there were email communications between Dr Everett, a member of the Plant & Food Research team, and members of Dr Sathyapala's team about the same type of work that Dr Vanneste was undertaking. Some emails were copied to Dr Sathyapala. Most were not. One email that was not copied to Dr Sathyapala was dated 6 July 2009 and specifically drew attention to the serious effects of the Italian outbreak. It suggested that Psa "needs to be on a [HILP] list … because at present we do not have [P]sa in New Zealand".

---

315 At [834].

However, Dr Sathyapala acknowledged that she had seen the email and very likely had discussed it with the Plant Imports Team. The Judge said:[316]

> I accept that this might have been given higher priority than it seems to have been given at this time. It is less clear what the outcome of that would have been given the approach Dr Sathyapala later took to the issue of Italian fresh fruit.

Not only is there no error in this conclusion but, in our view, there is no basis on which to conclude that action taken by Dr Sathyapala at that point would have made any difference to the outcome. The pollen had already been delivered to Kiwi Pollen and (as we come to shortly) efforts made a few months later to check whether any pollen had been imported were unsuccessful because QuanCargo did not show the June 2009 consignment.

[384] By about May 2009 Dr Vanneste was deeply involved, at Zespri's request, in investigating the Psa outbreak in Italy. In February 2009 he went to Te Puke to meet with Italian kiwifruit growers visiting New Zealand. In March 2009 he spent time in Italy to observe the symptoms of the Psa outbreak being experienced. It was spring and symptoms were easily visible. But it was not known that they were the symptoms of Psa3 as opposed to the strain of Psa known to have existed in Italy since 1992. Dr Vanneste returned to New Zealand and prepared a report for Zespri, concluding that the cause of the disease was Psa. In order to confirm that conclusion Dr Vanneste returned to Italy in May 2009 to take samples from orchards showing symptoms. On his return to New Zealand the bacteria was isolated and identified as Psa. There was however still no indication that the cause was a different strain of Psa. To that point Dr Vanneste's work had been undertaken for and primarily funded by Zespri. His work was not shared with MAF at that stage.

[385] In November 2009 the European Plant Protection Organisation issued an alert for Psa. In December 2009, following his return from overseas, Dr Ormsby reviewed the alert. Recognising the potential significance for New Zealand he undertook what he described as a "mini-risk analysis" or "detailed hazard identification" including possible pathways for entry. Dr Ormsby checked the QuanCargo database to see what

---

316 High Court judgment, above n 2, at [837].

was being imported that could be a possible pathway for Psa. He could see that nursery stock, tissue culture and fruit had been imported. There was no specific mention of pollen. He concluded that nursery stock was the only pathway of concern, checked the Nursery Stock IHS and, seeing the requirement for (among other things) PEQ for all nursery stock concluded that the pathway risk for Psa was adequately managed. He advised Dr Sathyapala, to whom he reported. Although Dr Sathyapala knew in 2007 that kiwifruit pollen had been permitted to be imported that fact did not emerge from the discussions that Dr Ormsby had with her following his review of potential pathways. On the evidence Dr Sathyapala would have had no reason to be involved in the 2009 permit, which was dealt with as a renewal of the 2007 permit.

[386] The Judge found that Dr Sathyapala had made assumptions about what had been imported based on documentation,[317] but that:[318]

> [t]he real problem was that MAF's QuanCargo records did not enable reliable searching of importations that had occurred. Had it done so, things might have been different. But that is by no means clear. By this time Kiwi Pollen had cycloned the anthers and one or more of the possible pathways for Psa to infect Kairanga and Olympos were in play.

[387] This was clearly a finding of fact that was open to the Judge.

[388] It is notable that it was not until 2010 or 2011 that the scientific community knew that Psa could be transmitted via pollen. During 2009 Dr Vanneste had continued to work on identifying the reason the symptoms of Psa in Italy had been so different from previous years. During 2010 tests on isolated live cells of Psa taken from Italian pollen showed a high level of contamination. The findings were not shared with MAF at that stage but did appear in a Zespri newsletter sent to Italian growers in May 2010. Other scientists (including Dr Balestra who gave evidence for the respondents) reached the same conclusion about the same time. Dr Vanneste presented his results at the New Zealand Plant Protection Society's annual conference in August 2011. In these circumstances there is no basis for treating the failure to take specific steps prior to the June 2009 consignment reaching Kiwi Pollen as negligent.

---

317 At [838].
318 At [839].

ISSUE 4: SECOND CAUSE OF ACTION — NEGLIGENCE AT THE BORDER

Overview

[389] This aspect of the case concerns the border stage of biosecurity risk management ie from the time goods arrive at the border until they are cleared for entry into New Zealand. At trial the respondents alleged that the June 2009 consignment should have been inspected and either was not inspected or was inspected negligently. They further alleged that discrepancies in the phytosanitary certificate meant that the inspector should have advised the Plant Imports Team by way of an NCR and, had that been done, the June 2009 consignment would have been inspected.

[390] The allegations were directed at establishing that, in the absence of these failings, the June 2009 consignment would not have been released because it contained anthers rather than pure pollen (for which the permit had been issued) and because the inspector who cleared the June 2009 consignment was sufficiently qualified and experienced to have differentiated the two.

[391] The Judge found that the Nursery Stock IHS required inspection of the June 2009 consignment[319] and no inspection was undertaken[320] but that the failure to do so was not negligent.[321] The Judge also found that the failure to identify and act on discrepancies in the documentation by issuing an NCR was an error but that this failure did not change the outcome.[322]

---

319 At [957]. The Crown does not agree with this finding but has not appealed it.

320 At [36] and [920]–[923]. There is no challenge to this finding.

321 At [36] and [960].

322 At [36], [970]–[971] and [977]–[980]. The first discrepancy was the difference between the species on the import permit and the phytosanitary certificate: see below at [448]. The other two discrepancies were the difference between the quantity noted on the phytosanitary certificate (4.5 kg) compared to the air weigh bill (11 kg), and the difference in exporter's name on the permit and phytosanitary certificate. The Judge found the discrepancy in quantity was explicable by the fact that a weigh bill reflects the gross weight (including packaging) whereas the phytosanitary certificate refers only to the net weight of the product itself. In relation to the difference in the exporter's name (being Bexely Inc on the import permit and Hangzhou Yuehao Agricultural Technology Consulting Co Ltd on the phytosanitary certificate), the Judge found that changes in the name of exporters was common and was unlikely to cause concern in the Plant Imports Team: at [967] and [973]–[974].

[392] The respondents cross-appeal the finding that the failure to inspect was not negligent and the finding that an NCR would not have changed the outcome on the basis that they are against the weight of the evidence.

[393] The respondents' reformulation of the border duty was expressed in this way:

> MAF and MAF personnel owed a duty of care:
>
> (B) in respect of the clearance on 30 June 2009 of a consignment of nursery stock, being kiwifruit anthers from China.
>
> **Particulars**
>
> …
>
> 2. The duty in (B) required:
>
> (a) compliance with s 27 of the Biosecurity Act 1993;
>
> (b) compliance with the processes required by the Importation of Nursery Stock Import Health Standard;
>
> (c) compliance with the processes required by MAF's Process Procedure Clearance of Plants and Plant Products.

[394] The general theme of the respondents' submissions is that inspection was mandatory under the Nursery Stock IHS and Process Procedure 41,[323] so the failure to inspect must have been unreasonable.

The relevant statutory provisions

[395] Section 27 of the Act relevantly provides:

> An inspector shall not give a biosecurity clearance for any goods unless satisfied that the goods are not risk goods; or satisfied—
>
> (a) That the goods comply with the requirements specified in an import health standard in force for the goods (or goods of the kind or description to which the goods belong); and

---

[323] Ministry of Agriculture and Fisheries *Process Procedure 41 Clearance of Plants and Plant Products* (16 May 2006).

> (b) That there are no discrepancies in the documentation accompanying the goods (or between that documentation and those goods) that suggest that it may be unwise to rely on that documentation…

[396] The Judge observed (correctly) that s 27 did not, itself, require inspection of a consignment. Rather, it required the inspector to be satisfied as to the matters specified in s 27(a)–(e), one of which was that "the goods comply with the requirements specified in an [IHS] in force for the goods". The Judge framed the question as whether MAF personnel acted reasonably in being satisfied of the matters in s 27.[324]

[397] Section 103(8) of the Act required inspectors to use best endeavours to comply with and give effect to any relevant performance or technical standards. In this case they were the Nursery Stock IHS and MAF's Process Procedure 41. The definition of nursery stock in Process Procedure 41 is the same as the Nursery Stock IHS definition.

[398] Clause 2.1 of the Nursery Stock IHS required inspection of nursery stock (and therefore pollen) as follows:

> A randomly drawn sample of 600 units, from each homogenous lot within … a consignment, shall be inspected on arrival. Where a lot is comprised of less than 600 units, 100% inspection is required.
>
> **Infestation by visually detectable quarantine pests on inspection at the border must not exceed the Maximum Pest Limit (MPL) which is currently set at 0.5%.** …

[399] Process Procedure 41 was described as operating instructions that could be consulted by both target evaluators and inspectors if something unfamiliar arose. It included the following provisions:

> 7.1.1.2 You must not give a biosecurity clearance until you are satisfied that the goods are not risk goods or they comply with an IHS.
>
> …
>
> 7.3.2.1 You must physically inspect a consignment where …
>
> - An IHS or PTI specifically requires this.
>
> …

[324] High Court judgment, above n 2, at [945]–[948].

> 7.4.3.1 All nursery stock must be inspected at the port of entry or at specifically approved transitional facilities designed for nursery stock inspections. …

And, it included details of sampling which reflected those contained in the Nursery Stock IHS.

Inspection during the clearance process

[400] The high number of goods entering New Zealand each year makes inspection of every consignment impractical.[325] Pre-border risk assessment and the documents that accompany consignments (eg customs declarations, waybills, manifests, invoices, and certifications by foreign government departments) mean that the decision to inspect is determined mainly by profiling the biosecurity risk associated with each consignment and targeting those warranting greater caution.

[401] The decision to clear goods is made by a target evaluator based on the accompanying documentation or on the advice of an accredited person following the unloading of a sea container or by an inspector following inspection. The target evaluator conducts on initial assessment of import documents for goods that need biosecurity clearance and decides what action should be taken, including holding the goods for further documentation or sending the goods to be inspected.

[402] The clearance process starts with consideration of the application made by the importer or its agent for a Biosecurity Clearance Certificate (BACC). An electronic system for issuing such certificates, the Electronic Biosecurity Clearance Certificate Application (EBACCA) was introduced in 2009. EBACCA was described as a virtual queue. BACC applications typically contain an air waybill or bill of lading, invoice or packing list. Other documents may include phytosanitary certificates and import permits if a permit is required. The target evaluator assesses the documentation, identifies the appropriate IHS to ascertain the relevant entry requirements and ensures that any import permit conditions have been complied with. This information is entered in the MAF database known as "QuanCargo" and a direction issued for the consignment.

---

[325] The Judge gave a detailed explanation of this fact at [201]–[202] and [882]–[885] that we do not need to record here.

[403] If the documents are compliant, the target evaluator issues directions under the BACC appropriate to the requirements of the relevant IHS and Process Procedure. One available direction is that the cargo be inspected by an inspector. Some IHSs require inspection. Others do not require inspection but a target evaluator or inspector may nevertheless consider that appropriate. The purpose of directing inspection is to ensure that the biosecurity risk is covered.

[404] Inspectors are appointed under the Act to assess, manage and clear imported goods at international airports and mail centres, ports and transitional facilities. They generally do not inspect unless directed by a target evaluator. Sometimes, however, where inspectors themselves receive mail or fax applications for biosecurity clearance, they undertake tasks that are, strictly, those of a target evaluator. In addition, there may be occasions on which an inspector considers inspection appropriate even though it has not been directed.

[405] If the documents do not comply with IHS requirements the response depends on whether the non-compliance is minor, such as a typographical error (non-technical non-compliance) or whether is actually fails to meet the requirements of the IHS (technical non-compliance). If the latter, one option is to issue an NCR to the appropriate standards team (here, the Plant Imports Team), seeking advice as to the appropriate next step.

The June 2009 consignment

[406] The June 2009 consignment was initially dealt with by a target evaluator, Ms Edel-Singh, and then by an inspector, Mr Hodges. Ms Edel-Singh and Mr Hodges both gave evidence. Understandably, neither had any recollection of the June 2009 consignment.[326] Their evidence was based on the documents and information stored on the QuanCargo database.

---

[326] For example, the Auckland Air Cargo centre processed 10,653 air cargo consignments in 2009. Mr Hodges worked there for eight months of that year (the remainder of the year was spent in Japan undertaking offshore vehicle clearances) and during that time he issued approximately 644 consignment directions.

[407] When Ms Edel-Singh first considered the EBACCA it did not have the phytosanitary certificate required by the 2009 import permit. The June 2009 consignment could not be progressed without the phytosanitary certificate so Ms Edel-Singh directed that the consignment be held pending production of the certificate.

[408] There was no indication that Ms Edel-Singh ever saw the certificate. Information on QuanCargo suggests that the certificate was produced at the Auckland Air Cargo public counter and dealt with by Mr Hodges. By then Mr Hodges had about six and a half years' experience in his role. He was trained to look at the IHS, any import permit and the Process Procedures.

[409] Mr Hodges entered details of the phytosanitary certificate and an authority for the release of the June 2009 consignment into QuanCargo within seven minutes of each other on the morning of 30 June 2009.[327] He did not recall inspecting the June 2009 consignment and the short period between details of the phytosanitary certificate being entered and the release authority being entered suggests that he did not do so because that would have required much longer than seven minutes.

[410] Mr Hodges did not recall making a decision about inspecting the June 2009 consignment but identified factors that he "now think[s]" may have been relevant to any such decision. These were the lack of any mention in the pollen section of the Nursery Stock IHS and import permit about inspection, doubt that there was anything he could usefully have inspected in its frozen state (though he accepted that he would have been able to differentiate between pollen and anthers even in a frozen state), frozen products were usually lower risk, the worry about damaging the product and the difficulty in resealing the package in order to keep it frozen. In cross-examination, however, he accepted that Process Procedure 41 required inspection of all nursery stock and that pollen was treated like other nursery stock.

---

[327] The release was printed later that day, at 4.20 pm. Although the records show Mr Hodges as printing that document, this seems unlikely because his shift finished at 3 pm that day. He suggested that he may have failed to log out and another of the inspectors used his login to print the release.

Issue 4(a): Did the High Court err in holding that MAF personnel owed a duty of care to Strathboss and members of the Strathboss class in respect of the clearance of the June 2009 consignment?

[411] Because the duty of care advanced in the High Court was broadly cast as a duty to exercise reasonable care and skill when undertaking biosecurity functions and responsibilities under the Act, the judgment did not address discretely the duty issue in relation to the inspection function. Several of the issues addressed in the context of the pre-border duty are also relevant here. While the Crown's quasi-legislative argument does not arise in relation to the inspection function, our conclusion on the justiciability of border control activity is equally applicable to the second cause of action.[328]

[412] As with the first cause of action, foreseeability is not in issue. We therefore move directly to proximity.

[413] For the reasons explained earlier in relation to the issues of legal relationship, direct cause of harm, and *Couch (No 1)*,[329] we would have found there was sufficient proximity between Mr Hodges and the respondents,[330] subject only to the question whether the Act is inconsistent with the imposition of a duty of care.

[414] Mr Hodges was an inspector appointed under s 103 of the Act. Hence he fell within the cohort of the persons specifically identified in s 163. As such he would be immune from suit and the Crown would incur no vicarious liability in respect of his conduct subject to the meaning of the proviso to that section.

[415] However, as noted in our earlier discussion of the proviso in s 163,[331] for the purpose of the duty analysis we proceed on the assumption that the phrase "reasonable cause" is synonymous with "reasonable care". On that approach, if it could be demonstrated that Mr Hodges acted without reasonable care, then the protection from civil liability which s 163 would otherwise provide would not avail him. It follows

---

328 See above at [191].
329 See above at [218]–[239].
330 Indeed, as noted above at [239], MAF had greater control over risk goods at the importation stage as a consequence of actual physical custody of the consignment.
331 See above at [216]–[217].

that, construed in that manner, s 163 would not exclude a duty of care in relation to conduct or omissions which involve an absence of reasonable care on his part.

[416] Our earlier conclusions on the Crown's three distinct policy reasons for the negation of a duty of care also apply to the inspection function.[332] The same potential indeterminacy implications could follow whether an incursion occurred through a failure to undertake a risk assessment in the import permit application process or a failure to conduct an inspection of the June 2009 consignment at the border.

[417] Consequently, as in the case of the first cause of action, policy considerations, primarily the spectre of indeterminate liability, would have led us to conclude that the imposition of a duty of care in respect of the inspection of imported goods would not be fair, just or reasonable.

Issue 4(b): Did the High Court err in holding that MAF personnel did not breach their duty of care by acts or omissions at the border clearance stage and/or that any breaches did not cause the clearance and release of the June 2009 consignment?

Did the Judge err in finding that the Nursery Stock IHS was ambiguous?

[418] The Judge concluded that, although it could have been expressed more clearly, the Nursery Stock IHS required inspection of the June 2009 consignment:[333]

> In contrast, the import plant teams were clear that pollen was "nursery stock" and therefore required an inspection. I agree with them that this was a correct interpretation of the Nursery Stock IHS. Pollen was "nursery stock" because it was "parts of plant imported for growing purposes" and because it was specifically dealt with in the Nursery Stock IHS.

[419] The Judge considered that Process Procedure 41 did not clarify the Nursery Stock IHS but simply:[334]

> … required an inspection if an IHS or a permit required this. It also required an inspection if the goods were nursery stock. However "nursery stock" was defined in the same way as the IHS, without any specific reference to pollen.

---

332 See above at [242]–[272].
333 High Court judgment, above n 2, at [957]. The Crown does not challenge this conclusion.
334 At [960].

[420] The Crown disagrees with this interpretation but it is not a ground of challenge.

[421] Notwithstanding her conclusion that the Nursery Stock IHS required the June 2009 consignment to be inspected, however, the Judge found that Mr Hodges had not acted negligently in failing to inspect because the obligation to inspect was not clear from the Nursery Stock IHS:

> [960] In my view Mr Hodges did not fall below the standard of reasonable care when he consulted the Nursery Stock IHS (as I accept he is likely to have done) and determined that inspection of the contents of the pollen consignment was not required by the IHS. If he consulted the Process Procedures as well, the same decisions could reasonably have been made. …
>
> [961] I therefore agree … that it would have been clearer to have included a requirement for visual inspection as part of the conditions of the permit. Absent that condition, Mr Hodges' decision not to carry out a visual inspection did not lack reasonable care with reference to the IHS or with reference to the Process Procedures which directed an inspection if the IHS required. This means that whether Mr Hodges inspected the contents of the consignment was a matter for him to assess in the circumstances.
>
> [962] I accept Mr Hodges' reasons, as to why it was likely he decided not to inspect the consignment's contents, were reasonable. …

[422] The Judge's finding that the Nursery Stock IHS was unclear was based on the fact that the definition of nursery stock did not expressly refer to pollen and that pollen was only mentioned in cl 2.2.3.[335] She specifically drew on the evidence of Ms Willmot, an experienced target evaluator, who said that cl 2.2.3 of the Nursery Stock IHS conveyed to her "take all you need to know about the pollen from the import permit".[336]

[423] The respondents say that the Judge's approach and conclusion were wrong because:

(a) there was no ambiguity in the Nursery Stock IHS and the relevant MAF personnel knew the June 2009 consignment was of nursery stock, subject to the Nursery Stock IHS, and agreed that inspection was required;

---

335 At [959]. For convenience, cl 2.2.3 of the Nursery Stock IHS stated "[a]n import permit must be obtained from MAFBNZ prior to import".

336 At [959].

(b) the evidence of Ms Willmot on which the Judge relied was not relevant to the issue of whether inspection was reasonably required under the Act and therefore inadmissible in determining the standard of care; and

(c) none of the factors identified by Mr Hodges justified the failure to inspect.

[424] The respondents also rely on acknowledgments by the relevant MAF personnel in cross-examination that this was the effect of the Nursery Stock IHS.

[425] The Crown maintains its position that the Nursery Stock IHS, at as June 2009, was ambiguous. Ms Higbee, for the Crown, points to a review of the Process Procedures undertaken in April 2009 which identified the lack of clarity in relation to pollen. This review led to a change to cl 2.2.3 of the Nursery Stock IHS that specifically required all import requirements to be detailed on the import permit. Mr Hodder submits that this demonstrated the complexity and ambiguity of the Process Procedures.

[426] Whether the Nursery Stock IHS was ambiguous is a question of law. The acknowledgment by MAF personnel as to the correct construction is not relevant. We disagree with the Judge's conclusion that the Nursery Stock IHS was unclear and ambiguous. First, the definition of nursery stock as contained in both the Nursery Stock IHS and Process Procedure included "[w]hole plants or parts of plants imported for growing purposes". Pollen clearly falls within this definition. Secondly, the requirement for inspection of all nursery stock appeared as the first item in the Nursery Stock IHS document, in the section headed "Import Specification and Entry Conditions". It is the only requirement imposed "on arrival".[337] Thirdly, the fact that it was understood as applying to all nursery stock is further supported by cl 7.4.3.1 of Process Procedure 41, stating "[a]ll nursery stock must be inspected at the port of entry". Although there were changes made to the Nursery Stock IHS later, to clarify it, they made no appreciable difference to the clarity of the requirement to inspect.

---

337 Nursery Stock IHS, cl 2.1.

[427] While we accept the concise form of the section specifically referring to pollen (cl 2.2.3) might add some confusion, that provision was clearly placed within cl 2, which commenced with the basic condition that all nursery stock subject to the Nursery Stock IHS were subject to the minimum requirement of inspection upon arrival. We therefore would have agreed with the respondents that the Nursery Stock IHS and Process Procedure 41 unambiguously required inspection.

Error in determining the standard of care: reliance on Ms Willmot's and Mr McLaggan's evidence

[428] Whether Mr Hodges' failure to inspect was negligent could only be determined by reference to the standard of care required of a person in his situation. As discussed above at [300], the standard of care is typically determined on the basis of evidence from someone with sufficient knowledge and/or experience to be able to say what a reasonable person in the situation of the defendant would have done. In the context of this case, that would turn on the evidence ie the practice of a skilled and informed MAF inspector exercising his or her functions in respect of the border processes for pollen imports under the Act in the circumstances of New Zealand border control in June 2009.

[429] Where a claim of negligence involves the breach of a statutory standard, non-compliance with that standard may be regarded as prima facie, possibly even compelling, evidence of negligence but is not determinative of a failure to exercise reasonable care.[338] Likewise, compliance with general practice, although relevant to the assessment of the standard of care, is not necessarily determinative.[339]

[430] The Judge did not make an express finding as to the applicable standard of care. However, she addressed evidence of border personnel that went to this issue. This evidence came mainly from target evaluators Ms Willmot and Mr McLaggan. The Judge expressly relied on their evidence in finding that Mr Hodges had not acted negligently.[340]

---

338 *Algie v DH Brown and Son Ltd* [1932] NZLR 779 (CA) at 785; *Oceanview Holdings Ltd v Clarry M O'Byrne Ltd* [1989] 1 NZLR 574 (HC) at 582; and Todd, above n 98, at [7.4.02].

339 See, for example, *Lloyds Bank Ltd v Savory & Co* [1933] AC 201 (HL); *Edward Wong Finance Co Ltd v Johnson Stokes & Master* [1984] AC 296 (PC); and Todd, above n 98, at [7.4.01].

340 High Court judgment, above n 2, at [950].

[431] Ms Higbee submits that since border personnel generally thought that all requirements for pollen would be stated on the import permit required by cl 2.2.3 and the permit was silent as to inspection, it was reasonable for Mr Hodges to conclude that inspection was not required. This was the effect of evidence given by Ms Willmot.[341] The respondents say that the Judge should have placed no weight on Ms Willmot's evidence.

[432] Ms Willmot was a team leader with the Target Evaluation Team from 2007 until 2015, and then a technical adviser for that team. She gave an extensive explanation of target evaluation, including the method by which target evaluators identify the applicable IHS and determine the relevant entry conditions (a step that Mr Hodges would also have taken).

[433] Ms Willmot described the following process of identifying the correct IHS for an import that is uncommon. This part of her evidence was not challenged. Following receipt of the application, a word search would be made for the relevant import. If the search produced more than one IHS, each would need to be considered to determine which is the most appropriate. Target evaluators do not read the whole IHS because they have a standard layout. Instead, the practice is to skim over the first sections that are not specific to the particular good being considered to get to the relevant entry conditions. Where the consignment has an import permit, the target evaluator should follow the requirements of both the applicable IHS and the permit. Ms Willmot said that it took on average 10 to 13 minutes to process an application, excluding complex applications. None of this evidence was contentious.

[434] However, Ms Willmot went on to explain what she thought she would likely have done when checking the Nursery Stock IHS that applied to the importation of Chilean kiwifruit pollen by Kiwi Pollen that she dealt with in January 2009.[342] This is the evidence under challenge.

---

341 At [950(a)–(b)] and [963].
342 See above at [37].

[435] Ms Willmot thought it likely that she would have "opened up the Nursery Stock IHS, pressed 'control F' and typed in 'pollen'". That would have taken her to cl 2.2.3 of that IHS which provided that an import permit had to be obtained. Alternatively, she "could have" scanned the contents page and clicked on "importation of pollen" which would have taken her straight to cl 2.2.3. Because the permit required a phytosanitary certificate she would then have gone to the certificate to check that it was in order. Ms Willmot did not recall considering the inspection paragraphs in the Nursery Stock IHS, though she was familiar with them. She commented:

> Reading paragraph 2.1, it tells me that we should be inspecting every consignment of nursery stock. But paragraph 2.1 in the Nursery Stock IHS is a perfect example of something I would expect, from a practical perspective, to probably skim over. It is one of the more generic statements in the standard. The general knowledge about this standard is that Quarantine Inspectors should inspect nursery stock.

Ms Willmot considered that the lack of any specific reference to pollen in cl 2.2 (the basic conditions) and cl 2.2.1.1 (being the section that listed the type of nursery stock only requiring the basic entry conditions) reinforced her belief that pollen was treated as a special type of nursery stock with specifically listed requirements on the permit. Ms Willmot did not say that this view was one that prevailed among border staff.

[436] The respondents say that this evidence, which they characterise as a post-facto reconstruction of what Ms Willmot would have done in relation to the earlier Chilean consignment, ought not have been given any weight as supporting a finding that Mr Hodges was not negligent in not inspecting the June 2009 consignment.

[437] We agree. Ms Willmot had no recollection of what she had done in relation to the Chilean import. Her evidence on this aspect was not framed so as to convey the general practice, nor even her own practice, but only what she thought (self-evidently with hindsight) she would have done.

[438] Nor do we consider that the Judge's finding was supported by the evidence of Mr McLaggan, the team leader for Target Evaluation at the Auckland Biosecurity

Centre between 2008 and 2015.[343] Mr McLaggan said in his brief that he would not have expected the June 2009 consignment (being small, arriving by air with government certification) to have been inspected because there would not be anything visible, and opening the package would risk destroying the goods, especially frozen goods.[344] However, in cross-examination, Mr McLaggan acknowledged that his observations did not apply to goods for which inspection was required under an IHS (which the Judge held to be the case).[345] Accordingly, the Judge's description of Mr McLaggan's evidence as being that "he would not have expected the June 2009 anthers consignment to have been physically inspected at the border" was not quite accurate.[346]

[439] Viewed as a whole, the evidence shows that what was required of an experienced inspector faced with the decision whether to inspect an importation of nursery stock (including an unusual importation such as kiwifruit pollen) was either familiarity with the relevant IHS, or reasonable care in identifying the terms of the IHS and consulting the Process Procedure 41. There is no basis on which to conclude that a reasonably competent inspector in Mr Hodges' position would have ignored the relevant clauses of the Nursery Stock IHS and Process Procedure 41 and limited his or her response to what was required by the import permit.

Negligence by the inspector

[440] Mr Hodges identified five factors that he "now" thinks "may" have been regarded as relevant to a decision not to inspect. The first was that there was nothing in the pollen section of the Nursery Stock IHS or the permit requiring inspection (in other words, a wrong interpretation of the Nursery Stock IHS). The other four reasons given by Mr Hodges as possibly relevant to the decision not to inspect related to the fact that the June 2009 consignment was frozen (there would be nothing to see,

---

343 Auckland Biosecurity Centre was the location at which the application for the June 2009 consignment was lodged in QuanCargo. The June 2009 consignment was then cleared by Mr Hodges at the Air New Zealand compound.

344 Inspection would only be undertaken if there was doubt about the veracity of the declared contents. This reflected the balance struck between maintaining biosecurity whilst not causing unnecessary delay or damage to goods.

345 See above at [418].

346 High Court judgment, above n 2, at [950(c)].

frozen products are usually lower risk, the risk of damaging the pollen and the difficulty of resealing the package).[347]

[441] The Judge found that Mr Hodges had consulted the Nursery Stock IHS and determined that inspection was not necessary,[348] and she accepted as reasonable Mr Hodges' explanations as to why it was likely he decided not to inspect the June 2009 consignment's contents.[349] She found that those reasons "are supported by Mr McLaggan … [and Ms] Willmot".[350] As to the relevance of the June 2009 consignment being frozen, the Judge noted that both Mr McLaggan and Mr Hodges had accepted that it was possible to inspect the consignment without damaging it but noted that:[351]

> … the Process Procedures contemplate Nursery Stock may arrive frozen. However they do so by indicating that discretion is required when reconciling the number of lots with the consignment documentation. The fact that a frozen consignment can be inspected without damaging it does not mean its frozen status is irrelevant to a Quarantine Inspector's decision on whether to inspect it.

[442] The Crown supported these conclusions on the basis that the misconstruction of legislation by a public servant will rarely be considered negligent.[352] The respondents, however, say that there was no room for interpretative error given the clear terms of the Nursery Stock IHS and do not accept that any of the reasons advanced by Mr Hodges were relevant to the decision not to inspect.

[443] If Mr Hodges did not inspect because he misunderstood the Nursery Stock IHS or misinterpreted it as not requiring inspection, a basis exists for the Judge's conclusion that he had not acted negligently. But Mr Hodges did not suggest that these factors were, in fact, what impacted his thinking on the day. Mr Hodges had no recollection of dealing with the June 2009 consignment. There was no direct evidence of why he did not inspect. He was unable to say what his view was at the time about

---

347 Although Mr Hodges referred to the cargo as frozen it is not clear from the evidence how he knew that as the phytosanitary certificate does not refer to it. However the point did not arise in argument.

348 High Court judgment, above n 2, at [960].

349 At [962].

350 At [962]–[963].

351 At [964].

352 *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC) at 710 and 717.

the obligation to inspect. For example, in re-examination he was asked to recall whether he thought he had discretion as to inspection of pollen imports. He responded "I don't entirely recall but the concept of something that was a nursery stock but frozen might have had some discrepancies, but other than that…" In cross-examination he accepted that Process Procedure 41 required inspection of all nursery stock and that pollen was treated like other nursery stock. In these circumstances, any finding as to why Mr Hodges did not inspect could only be made by inference, including (if warranted) Mr Hodges' usual practice. It will, however, be evident from our previous conclusions that there was no adequate evidential basis for such a finding.

[444] The Nursery Stock IHS was not ambiguous. The timing suggests that Mr Hodges probably did not follow his usual practice of consulting the IHS; he said that the process of checking one package of something small with the clearance invoice would take anywhere between 15 minutes to an hour, yet he cleared the June 2009 consignment in seven minutes. Ms Willmot's evidence on this point was inadmissible and Mr McLaggan's evidence (taken as a whole) did not support Mr Hodges. Mr Hodges also made at least one other acknowledged error in failing to identify discrepancies between the import permit and the phytosanitary certificate. In these circumstances we are not satisfied that there was a sufficient evidential basis for finding that Mr Hodges had considered, but misinterpreted, the Nursery Stock IHS.

Conclusion on breach

[445] We would have agreed with the Judge that the consignment had to be inspected. But we would have held, contrary to the Judge's finding, that the failure to do so fell below the standard of care expected of skilled and informed MAF personnel in the circumstances. Although the evidence showed that the target evaluators would have treated pollen as a distinct form of nursery stock that fell outside of the entry conditions stipulated by the Nursery Stock IHS, this did not reflect the Nursery Stock IHS and nor was it the view held by the Plant Imports Team. The failure to apply the entry conditions of the Nursery Stock IHS was not due to misconstruction but rather a failure to properly consider the relevant documents and regulations.

Causative effect of failing to inspect and failing to issue an NCR

[446] As noted, the thrust of the respondents' argument is that, had the June 2009 consignment been inspected, Mr Hodges would have identified the fact that it contained anthers rather than pollen and would therefore not have complied with the description of the goods permitted to be imported. In fact, for the reasons we have already discussed in relation to the wording of the 2009 permit, the existence of anthers in the June 2009 consignment would have satisfied the 2009 import permit because the import permit allowed for either milled or unmilled pollen.[353] Of course, unmilled pollen was not what was intended when the decision was made in December 2006 to allow the Kiwi Pollen application. But the wording of the 2009 import permit as ultimately framed did not reflect that decision. This was undoubtedly a serious failing by those who prepared the 2009 import permit. Mr Hodges' failure to inspect however could have had no causative effect because of the terms of the 2009 import permit.

[447] The respondents' final head of challenge on cross-appeal was to the Judge's finding that issuing an NCR would have not led to the June 2009 consignment being inspected.

[448] The evidence was consistent that there was a discrepancy between the species identified in the import permit and the phytosanitary certificate which should have caused Mr Hodges to send an NCR to the Plant Imports Team, whose role included advising on NCRs. What would have happened therefore depended on the response of the Plant Imports Team. No policy document existed to indicate what should occur. Ms Campbell, the adviser then responsible for Nursery Stock in the Plant Imports Team, said that the discrepancy in the phytosanitary certificate would have been unlikely to cause concern because the same requirements imposed by the *Actinidia* schedule in the Nursery Stock IHS would apply to any species of *Actinidia* pollen.[354] She suggested the available options as being for the importer to have the phytosanitary certificate reissued or, if that were not possible, an importer declaration stating the correct species.

---

353 See above at [375].

354 Although the *Actinidia* schedule in the Nursery Stock IHS did not apply to pollen, that schedule relevantly shows that there is no distinction between the various species of *Actinidia* for biosecurity purposes.

[449] Dr Butcher's evidence was similar, saying that there was no way of knowing exactly how an NCR would have been dealt with by the Plant Imports Team at that time. This was because the NCR process was essentially another assessment process, based on the nature of the discrepancy and whether it represented a material change in the risk that MAF was dealing with.

[450] The Judge accepted that there was a general expectation within the Plant Imports Team that when a permit for pollen was issued the consignment would be inspected at the border clearance stage and accepted that this fact supported the argument that there would have been inspection had the matter been referred to the Plant Imports Team through an NCR.[355] But she concluded:

> [977] On the other hand, what [the Plant Imports Team] expected when they issued pollen permits is not necessarily what would have occurred in response to an NCR. It is certainly possible Plant Imports would have asked whether an inspection had been carried out (and thereby learned that it had not). But it is not necessarily what would have happened. Dr Butcher said that there is no way of knowing exactly how the NCR would have been dealt with by the Plant Imports team at the time. This is because the NCR process is essentially another assessment process. It is based on the nature of the discrepancy and whether this materially changes the risk that MAF is dealing with. Plant Imports did not have any policy document which stated what was to occur.
>
> …
>
> [979] In this case the phytosanitary certificate was an original one. It contained the necessary declaration, to conform to the permit, that the pollen had been produced from hand collected and unopened male flower buds only.
>
> [980] In these circumstances it cannot be said with any confidence that an NCR concerning the species would have led to the consignment being destroyed or inspected. If, instead, contact had been made with the importer for clarification of the species, it is quite possible the border staff would have been told the species' name was incorrect on the certificates. … The mistake as to species was therefore in the certificate, not in the contents of the consignment (which, as it happened, contained anthers rather than milled pollen).

[451] The Judge determined this issue on the burden of proof, finding that the respondents had not discharged the burden of showing that, more likely than not, the exercise of reasonable care would have resulted in the June 2009 consignment

---

355 High Court judgment, above n 2, at [976].

being inspected, destroyed or returned to the exporter rather than reaching its destination at Kiwi Pollen.[356]

[452] Mr Salmon argues for the respondents that this conclusion was against the weight of evidence, given the expectation of the Plant Imports Team that the Nursery Stock IHS required inspection. The Crown says that the relevant discrepancy did not raise any question about inspection and there was no evidence that, even if an NCR had been generated, inspection would have been raised as an issue. Ms Higbee argues that this point had not been put to any of the witnesses from the Plant Imports Team and the border staff who gave evidence did not agree that an NCR would have led to inspection.

[453] In fact, it is clear that the June 2009 consignment should have been inspected at some stage. But for the reason just discussed we would have found that the issue of an NCR would have made no difference; the discrepancy in the documentation would likely have been resolved and, because of the wording of the import permit, inspection would not have disclosed anything untoward.

Conclusion

[454] This ground of cross-appeal would have failed.

ISSUE 5: CAUSATION

Issue 5(a): Did the High Court err in holding that Psa3 entered New Zealand with the June 2009 consignment?

[455] At trial the respondents asserted that, on the totality of the evidence, Psa3 entered New Zealand with the June 2009 consignment. Specifically, the epicentre of the outbreak was at an orchard owned by Kiwi Pollen's principals (Kairanga) and another orchard close by (Olympos); plant material and pollen were known to be vectors for Psa3, there were opportunities for infection to spread to the orchards from where the June 2009 consignment was processed several kilometres away, the June

---

356 At [981]–[982].

2009 consignment came from Shaanxi Province in China; and genetic evidence linked the strain of Psa3 found in Te Puke to Shaanxi.

[456] The Judge accepted these assertions.[357] Her findings can be summarised as follows:

(a) Based on the genetic evidence and evidence about the epicentre, the spread of reported symptoms and the known characteristics of Psa3, the incursion was caused by a single recent event within five years prior to November 2010.[358]

(b) It was likely that Psa3 began to multiply somewhere close to the Kairanga and Olympos orchards.[359]

(c) Psa3 could have entered New Zealand with the June 2009 consignment because Psa3 could have survived on the anthers during transport from Shaanxi to New Zealand and during milling of the pollen.[360]

(d) There were a number of ways in which Psa3 could have infected the Kairanga and Olympos orchards, although it was not possible to say which, if any, of those identified were the most likely. Even if none of those identified as possible pathways caused the incursion, there were multiple pathways by which infection could have occurred.[361]

(e) Genetic evidence and the testing of a subsequent consignment of pollen imported by Kiwi Pollen from China indicated that the particular strain of Psa3 that entered New Zealand probably originated in China.[362]

(f) On the basis of the genetic evidence, it was "quite possible and plausible" that the New Zealand strain of Psa3 came from Shaanxi and

---

357 At [1253].
358 At [1253(a)–(c)].
359 At [1253(d)].
360 At [1253(e)].
361 At [1253(f)].
362 At [1253(g)].

was a close relative of a strain of Psa3 found in Dangdongcun, Mei County, Baoji Prefecture in the Shaanxi Province (less than 50 km from the orchard where the anthers were sourced).[363]

(g) There was no other known source for the incursion.[364]

[457] The Crown says that the Judge erred in three broad ways. First, by putting weight on the Crown's failure to advance a counter-factual. Secondly, by taking the wrong approach to the assessment of circumstantial evidence and failing to apply the requisite standard of proof. Thirdly, by relying on inadmissible genetic evidence said to link the Psa3 strand found in Te Puke to Shaanxi. Mr Hodder argues that these errors led to incorrect findings regarding Shaanxi as the source of the New Zealand strain of Psa3, Kairanga and Olympos as the epicentre of the incursion and the means by which the orchards at the epicentre were infected.

Did the Judge wrongly require the Crown to prove a counter-factual?

[458] The Crown says that the cause of the Psa3 incursion is unlikely ever to be known. Mr Hodder maintained at trial (and on appeal) that the Crown did not know and did not have to prove how Psa3 came into New Zealand. Although he posited either inadvertence or smuggling, the Crown's firm position was that this was a matter for the respondents to prove and the existence of these other possibilities made that very difficult. The Crown resisted any suggestion that it had an onus to advance the other possibilities on the balance of probabilities standard.

[459] After an extensive discussion about the means by which Psa3 entered New Zealand and infected the respondents' vines, the Judge concluded that the epicentre of the incursion was the orchard owned and managed by the principals of Kiwi Pollen (Kairanga) and the orchard across the road (Olympos), that there were several viable ways in which that infection could have occurred and, more likely than not, the strain of Psa3 that infected the vines came from Shaanxi in China, which was

---

363 At [1253(h)].
364 At [1253(i)].

the area from which the June 2009 consignment likely came.[365] Following that discussion the Judge referred to the lack of any alternative theory by the Crown:

> [1250] At the pre-trial stage the defendant was directed to plead an alternative theory if he had one. The defendant has been up front that he does not have one. Nor is there any support for an alternative theory in the evidence. … The defendant's position is that it will never be known how Psa entered New Zealand. While it may never be proven to a level of complete certainty, that is not the test in a civil claim.

[460] Then, in summarising the reasons for concluding that the June 2009 consignment was the source of the Psa3, the Judge included as one of the reasons:[366]

> There is no other known source for the incursion. Other conceivably possible pathways are unlikely and there is no evidence to suggest they in fact happened.

[461] On appeal the Crown says that the Judge wrongly treated the Court's task as being to determine the cause of the incursion rather than to decide whether the respondents had discharged their burden of proof.[367] First, the Judge placed weight on the Crown's failure to offer an alternative cause. Secondly, she accepted the respondents' causation theory, in part because there was no other known cause for the incursion.

[462] We agree that whether the Crown offered an alternative theory or not was irrelevant to the question whether the respondents had discharged the burden on the evidence they had adduced. However, we are satisfied that the Judge approached the causation issue very much on the basis that the burden lay with the respondents.[368] By the time the Judge came to make the comments now complained of, she had already considered the respondents' theory of causation and reached conclusions that would support a finding that the respondents had discharged the burden of proof.

[463] Notwithstanding its position at trial that it was not advancing a particular causation theory, the Crown did adduce evidence about the incidence of illegal importation, including illegal importations of kiwifruit plant material. The Crown did

---

365 At [996]–[1235].
366 At [1253(i)].
367 Referring to *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948 (HL) [*The Popi M*] at 951.
368 See, for example, High Court judgment, above n 2, at [983], [985] and [987]–[988].

not rely on this evidence to prove a causation theory but rather to demonstrate the difficulty faced by the respondents in proving that the June 2009 consignment was the source of the Psa3 incursion. We see no error in the Judge referring to this evidence.[369] Doing so could not fairly be regarded as undermining the conclusions she had already reached on this issue. The comment amounted to no more than an acknowledgment of the Crown's case at trial.

[464] Nor do we see the Judge's comment at [1250] as to the lack of any alternative theory as wrongly imposing a burden on the Crown. The absence of any other plausible theory is, in itself, a matter that the Judge was entitled to take into account in assessing the likelihood that the respondents' theory of the case was correct.

Did the Judge apply the correct legal principles in assessing the circumstantial evidence?

[465] The Judge considered that the circumstantial evidence was properly viewed as "strands in a cable"[370] rather than "links in a chain".[371] At trial, and on appeal, the Crown contended for the latter, asserting that each individual factual "link" required proof on the balance of probabilities before an inference could be drawn that could be used for the ultimate conclusion on causation.

[466] In setting out the relevant principles, the Judge relied on the following explanation in *Milton Keynes Borough Council v Nulty*:[372]

> [34] A case based on circumstantial evidence depends for its cogency on the combination of relevant circumstances and the likelihood or unlikelihood of coincidence. A party advancing it argues that the circumstances can only or most probably be accounted for by the explanation which it suggests. Consideration of such a case necessarily involves looking at the whole picture, including what gaps there are in the evidence, whether the individual factors relied upon are in themselves properly established, what factors may point away from the suggested explanation and what other explanation might fit the circumstances. … [After such consideration] the court has to stand back and ask itself the ultimate question whether it is satisfied that the suggested explanation is more likely than not to be true. …

---

369 At [1250].

370 Actually the more usual analogy is "strands of a rope": see, for example, *Watt v R* [2014] NZCA 459 at [13].

371 High Court judgment, above n 2, at [990].

372 At [993], citing *Milton Keynes Borough Council v Nulty* [2013] EWCA Civ 15, [2013] 1 WLR 1183.

[467] The Judge then described the required approach as it applied to the present case:

> [1252] The plaintiffs' case is a circumstantial one. It involves looking at all of the circumstances that have been established, what factors point away from the inference the plaintiffs ask the Court to draw from them and what other explanation might fit the circumstances. The Court must stand back and look at the picture as a whole and determine whether it is satisfied, on rational and objective grounds, that the case for believing the June 2009 anthers consignment was the cause of the incursion is stronger than the case for not so believing.

[468] Although there was no criticism from the Crown of the general principles stated in *Milton Keynes,* Mr Hodder argues that the more appropriate metaphor in this present case is that of "links in a chain" rather than "strands in a cable". This is because, in order to prove their case, the respondents needed to prove a number of facts that were chronologically sequential, each dependent on the previous fact having been proven. These were:

(a) the June 2009 consignment was infected with Psa3;

(b) the Psa3 from the June 2009 consignment moved at least 7.5 kms from Main Rd (where the June 2009 consignment was processed) to Mark Rd (where the Olympos and Kairanga orchards are located);

(c) the Psa3 was applied or transferred to the Olympos orchard so as to infect it in a way that led to symptoms of Psa3 occurring in the middle of the orchard on 21 October 2010, or to the Kairanga orchard in a way that meant Psa3 symptoms would first occur in the C block of that orchard in early spring 2010; and

(d) either the Olympos or the Kairanga orchard was the first site of the Psa3 incursion in New Zealand.

[469] We disagree. In New Zealand the recognised approach to circumstantial evidence is to treat such evidence as the "strands in a cable" rather than "links in

a chain". In *Thomas v R* this Court rejected the latter, referring to the following passage in *R v Exall*:[373]

> What the jury has to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is, under the circumstances, reasonable and probable or otherwise. … Thus it is that all the circumstances must be considered together. It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence—there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of.

[470] *Thomas* was, of course, a criminal case but there is no reason to take a different approach to the assessment of circumstantial evidence in a civil case. The only difference will be the point at which the fact finder is satisfied to the requisite standard of proof.

[471] A more recent application of that approach is to be found in *Commissioner of Police v De Wys*, a civil case brought under the Criminal Proceeds (Recovery) Act 2009.[374] In that context, this Court said:

> [8] … The correct approach is to consider the combined effect of a number of separate items of evidence in order to determine whether the Commissioner has proved, on the balance of probabilities, that the respondents were involved in cannabis cultivation and sale.
>
> [9] Circumstantial evidence allows a fact-finder to infer that a particular fact exists, even if there was no direct evidence of it. A single piece of circumstantial evidence will generally allow for more than one explanation. However, a number of separate items of circumstantial evidence, when considered together, may strongly support the drawing of a particular inference. Circumstantial evidence derives its force from the involvement from a number of factors that independently point to a particular factual conclusion. The analogy that is often drawn is that of a rope: any one strand of the rope may not support a particular weight, but the combined strands are sufficient to do so.
>
> [10] It is only the ultimate issue in a circumstantial case that must be proved to the required standard. In this case that issue is whether the

---

373 *Thomas v R* [1972] NZLR 34 (CA) at 38, citing *R v Exall* (1866) 176 ER 850 at 853.
374 *Commissioner of Police v de Wys* [2016] NZCA 634.

> respondents benefitted from significant criminal activity. The Commissioner must prove that they did, on the balance of probabilities. He is not required, however, to separately prove each individual strand of evidence to the balance of probabilities standard before the Court can take that evidence into account. In *Thomas v R* this Court observed that "[it] is the totality of [the] narrative to which the formula 'beyond reasonable doubt' applies".
>
> (footnotes omitted)

[472] The respondents' case was that, as a result of MAF's negligence, an infected consignment of kiwifruit pollen entered New Zealand and infected the respondents' vines. The respondents could discharge the burden of proof by showing that, on the totality of the evidence, the cause of the damage was more likely than not the Psa3 that came with the June 2009 consignment and that it infected the two identified orchards before spreading to others. We do not accept that the facts of this case justify a departure from the long-standing approach of treating each piece of evidence relied on as a "strand in the cable" in the manner described in *Milton Keynes*. It was, therefore, not necessary to prove each piece of circumstantial evidence in a particular order or to the standard of the balance of probabilities.

[473] During argument the Crown raised the further question as to how reliable a piece of evidence must be in order to be given weight as circumstantial evidence. This question typically arises in cases that turn on epidemiological evidence as to the cause of a disease where the exact mechanism of infection is unknown.[375] In this case the issue arises in relation to the evidence adduced by the respondents about the genetic origin of the New Zealand strain of Psa3 and the mechanism by which infection of the vines at the epicentre of the outbreak occurred.

[474] Epidemiological evidence, or evidence relating to the spread of disease, only provides evidence of possibility.[376] It goes no further. As to whether an inference of causation in a specific case could or should be drawn, Spigelman CJ said in *Seltsam Pty Ltd v McGuiness*:[377]

---

375 The term "epidemiological" refers to the study of incidence and distribution of diseases, and of their control and prevention.

376 See, for example, *Seltsam Pty Ltd v McGuiness* [2000] NSWCA 29, (2000) 49 NSWLR 262 at [78]–[79].

377 At [98] and [153]. The issue in *Seltsam* was whether, in determining whether exposure to asbestos could cause renal cell carcinoma, scientific evidence of that possibility should be regarded as circumstantial evidence which, alone or in combination with other evidence, could be sufficient to establish causation in a specific case.

> The courts must determine the existence of a causal relationship on the balance of probabilities. However, as is the case with all circumstantial evidence, an inference as to the probabilities may be drawn from a number of pieces of particular evidence, each piece of which does not in itself rise above the level of possibility. Epidemiological studies and expert opinions based on such studies are able to form "strands in a cable" of a circumstantial case.
>
> …
>
> Whether or not the inference is open or should be drawn, depends on the quality of the underlying facts, particularly in terms of the degree of "possibility" which is involved.

[475] The Judge relied on the latter part of this passage as expressing the principle that should apply to the causation question before her.[378] The Crown challenges the Judge's reliance on *Seltsam* on the basis that it has only limited application and has been considered in New Zealand in the context of cases brought under the accident compensation scheme, from which it is clear that an inference can only be drawn from factors supported by the evidence and that a risk of causation is not sufficient.

[476] In *Accident Compensation Corporation v Ambros* this Court cited *Seltsam* in the context of a claim for medical misadventure under the Accident Insurance Act 1998.[379] Discussing the difference between the medical or scientific approach and the legal approach to causation the Court said:

> [67] The different methodology used under the legal method means that a court's assessment of causation can differ from the expert opinion and courts can infer causation in circumstances where the experts cannot. This has allowed the Court to draw robust inference of causation in some cases of uncertainty… However, a court may only draw a valid inference based on facts supported by the evidence and not on the basis of supposition or conjecture … Judges should ground their assessment of causation on their view of what constitutes the normal course of events, which should be based on the whole of the lay, medical and statistical evidence, and not be limited to expert witness evidence…
>
> [68] Spigelman CJ in *Seltsam* said that the only time that a judge is not able to draw a robust inference of causation is in cases where medical science says that there is no possible connection between the events and the injury or death … If the facts stand outside an area in which common experience can be the touchstone, then the Judge cannot act as if there were a connection. However, if medical science is prepared to say that there is a possible connection, a Judge may, after examining all the evidence, decide that causation is probable. …

---

378 High Court judgment, above n 2, at [994]–[995].

379 *Accident Compensation Corp v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.

> [69] We agree that the question of causation is one for the courts to decide and that it could in some cases be decided in favour of a plaintiff even where the medical evidence is only prepared to acknowledge a possible connection. …
>
> [70] … It must, however, always be borne in mind that there must be sufficient material pointing to proof of causation on the balance of probabilities for a court to draw even a robust inference on causation. Risk of causation does not suffice.
>
> (citations omitted)

[477] There is no reason why the general statements made in *Seltsam* and applied in *Ambros* ought not to apply equally in a case such as the present in which there is no direct evidence either of the origin of the New Zealand strain of Psa3 or of the mechanism by which it might have spread. The court must weigh the expert epidemiological evidence expressed in opinion form with the other strands of evidence. But to be considered, that evidence must be admissible under the Evidence Act 2006. In other words, to constitute a "strand in the cable" each piece of evidence must be sufficiently relevant and probative and, in the case of expert opinion, satisfy the heightened threshold for admissibility under s 25, which we discuss in more detail in relation to the admissibility of the genetic evidence. The statutory criteria provide a baseline of reliability to all circumstantial evidence that a Judge may take into account.

[478] To summarise, we would have found no error in the Judge's approach to her assessment of circumstantial evidence. The analogy of "strands in a cable" represents the orthodox approach and there was nothing in the facts of the case that warranted a departure from that. It follows that we would have rejected Mr Hodder's contention that each strand of circumstantial evidence was required to rise above the level of possibility and satisfy the burden of proof in order for the Judge to take that strand into account. The Judge was entitled to take into account any piece of admissible evidence adduced to prove causation.

Admissibility of the genetic evidence

[479] We turn next to the issues arising from the evidence about the genetic origin of the New Zealand strain of Psa3.

[480] Some explanation of the relevant scientific facts is needed. A genome is the genetic material of an organism in which the DNA molecules comprise two complementary strands of nucleotides or "base pairs". Bacterial DNA typically comprises a single circular chromosome (the "core genome"). Reproduction of the bacteria occurs either through the transfer of DNA by physical proximity (horizontal DNA transfer) or the division of the DNA cells into replicates, identical daughter cells which are clones of the parent cell (vertically inherited DNA).

[481] Gene mutations can occur in vertically inherited DNA. One form of mutation is the change of a single nucleotide, known as single nucleotide polymorphism (SNP). SNPs reside within the bacteria's core genome. Analysis of SNPs can show genetic relationships. SNPs generally occur at a low frequency and can accumulate over time. Where the accumulation of variations is stable over time a "molecular clock" analogy can be used to determine the period over which the mutations have occurred.

[482] Whole genome sequencing (WGS) is an orthodox method of establishing the genetic lineage of an outbreak.[380] WGS was undertaken by experts engaged by both the Crown and the respondents. They agreed that, most likely, the Psa3 outbreak in New Zealand was the result of a single entry of the bacteria into New Zealand in the months or possibly up to a few years prior to 2010 and of a single clonal origin. In other words, the New Zealand strain of Psa3 evolved from a common ancestor. The Judge accepted those views.[381] She also concluded that China was the most likely place of origin of the global pandemic lineage of Psa3.[382] That conclusion is not challenged. The point of contention is the Judge's finding that Shaanxi was the source of the New Zealand outbreak. The Judge had found that the anthers in the June 2009 consignment were most likely sourced from an orchard in Shaanxi (referred to as "Orchard 1").

[483] The WGS undertaken by the parties' experts used samples of Psa3 taken from Te Puke (the New Zealand foundation strain), from Dangdongcun, Mei County,

---

380 WGS involves sequencing all the base pairs of DNA in a sample of bacteria and comparing them to another, fully sequenced, reference sample to identify the presence of any SNP compared to the reference sequence. However, the quality of the analysis depends on the sample size and geographic location.

381 High Court judgment, above n 2, at [1183].

382 At [1186].

Baoji Prefecture, Shaanxi Province (the M7 sample) and from the publicly available "GenBank". As noted, the M7 sample was taken from an orchard less than 50 km from "Orchard 1". The experts were agreed, however, that the WGS analysis did not show that the New Zealand Psa3 came from Shaanxi. This was because the New Zealand strains of Psa3 did not share SNPs with the overseas population from which transmission from that population could be inferred. Further, the science of phylogenetics is based on patterns of vertical inheritance which show stable inherited characteristics that link strains. That would require SNPs in the core genome that link the New Zealand strains with Shaanxi. The Judge accepted that the data did not show that.[383]

[484] The Crown argues that the Judge should have stopped at that point and concluded that there was insufficient evidence to conclude that it was "quite possible and plausible" that the New Zealand strain of Psa3 came from Orchard 1 in Shaanxi. However, the Judge proceeded to consider other scientific evidence — principally a theory advanced by the respondents' expert, Dr Poulter, based on the presence in the New Zealand samples of Psa3 of elements known as integrative conjugative elements (ICEs).[384] The Judge also placed weight on a method of analysis known as Multilocus VNTR.[385] The Crown says that the former was inadmissible and too much weight was given to the latter.

Evidence about PacICE1

[485] Unlike SNPs, which reside within the core genome of bacteria, ICEs reside outside the core genome. They can be both inherited vertically and transferred horizontally. Moreover, their horizontal transfer in or out of bacterial DNA can occur without leaving any trace. For that reason, they are not reliable indicators of evolutionary relationships and are not included in phylogenetic analysis. However, Dr Poulter ascribed significance to a type of ICE, PacICE1, found in both the New Zealand Psa3 sample and the M7 sample which, although not identical, was very similar. He did so on the basis of a molecular clock theory.

---

383 At [1192].
384 At [1197]–[1212].
385 At [1213]–[1231].

[486] In summary, Dr Poulter considered that a comparison of the diversity in pandemic lineages in China, Chile, Italy and New Zealand reached by averaging the SNPs over the preceding six to seven years indicated that these pandemic lineages shared a common ancestor some time since 2000. On the assumption that the mutation rate is similar for the New Zealand lineage and M7, these strains would have shared a common ancestor five to 15 years prior to their isolation.

[487] The fact that PacICE1 was present in both the New Zealand strain of Psa3 and M7 did not amount to evidence of an association between them because the nature of PacICE1 meant that it was not possible to tell whether it was acquired vertically from a common ancestor or horizontally. But Dr Poulter described PacICE1 in Psa3 as "exquisitely rare" and therefore considered that the presence of PacICE1 in the Shaanxi strain from 2010 and the New Zealand strains from 2010 provided "evidence of the strongest kind" linking them. The lack of any evidence of PacICE1 in China other than in Shaanxi in 2010 was a point that Dr Poulter regarded as "a diagnostic statement of great clarity".

[488] The Crown's experts, Dr McCann and Professor Holmes, rejected Dr Poulter's molecular clock theory as unreliable and based on statistically insignificant evidence. The Judge explicitly accepted their evidence, saying that Dr Poulter's analysis of the rate of evolution "does not provide much support for a Shaanxi origin for the New Zealand incursion".[386] But she then added:[387]

> … it is nevertheless within the bounds of reasonable possibility that the M7 Shaanxi and foundation New Zealand strain shared a common ancestor relatively recently. There are 20 SNPs between M7 and the New Zealand foundation strain. There are strains in the New Zealand lineage with 40 SNPs from the New Zealand foundation strain. This provides some support, although weak, for a Shaanxi origin.

[489] However, Dr McCann and Professor Holmes also rejected the presence of PacICE1 in both samples as significant because, apart from the inherent uncertainty as to how it was acquired, geographic and temporal biases in the sampling affected the reliability of any inference sought to be drawn. The Judge accepted that it was not possible to draw a safe inference from the sampling to date about how rare PacICE1

---

386 At [1196].
387 At [1196] (footnote omitted).

is in China or elsewhere and that if it was not, in fact, rare, then independent horizontal acquisition could explain its presence in both samples.[388] But the Judge nevertheless saw significance in the fact that the ICEs in both samples were almost identical and treated it as a piece of circumstantial evidence that could be taken into account in determining the source of the Psa3 in New Zealand:

> [1212] In summary, it is reasonably possible and plausible they share a recent common ancestor that acquired the PacICE1. Nevertheless it also remains possible that this is no more than an unconnected coincidence. On its own, therefore the presence of PacICE1 is not sufficiently reliable to establish that the New Zealand Psa3 incursion came from Shaanxi. It is, however, a factor that can be taken into account when assessing the strength of the link between Shaanxi and the New Zealand Psa3 outbreak. … The presence of PacICE1 in the Shaanxi and New Zealand strains is a "strand" that is established. It is also established that its presence in both strains could be explained by them sharing a recent common ancestor, although there are other possible explanations. This "strand" can be added to the other "strands" in the cable of circumstantial evidence that as a whole must be considered.

[490] Mr Hodder argues that the Judge should not have relied on either the evidence about the molecular clock theory or on the PacICE1 evidence. As to the former, he submits that evidence "within the bounds of reasonable possibility" is not a standard on which evidence should be admitted and relied on. As to the PacICE1 evidence, he says it is not sufficiently reliable in a scientific sense to be admissible under s 25(1) of the Evidence Act, which allows the admission of opinion evidence only if:

> … the [trial judge] is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.

In other words, s 25(1) only permits expert evidence to be heard if it is reasonably required to educate the fact finder(s) in relation to particular issues they need to consider.[389]

[491] In *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* this Court described substantial helpfulness for the purposes of s 25(1) as "an amalgam of

---

388 At [1210].

389 *R A v R* [2010] NZCA 57, (2010) 25 CRNZ 138 at [27(a)].

relevance, reliability and probative value".[390] The Privy Council also considered the application of s 25(1) in *Lundy v R* and endorsed the comments of the United States Supreme Court in *Daubert v Merrell Dow Pharmaceuticals Inc* regarding the factors likely to be helpful when evaluating the soundness of novel science.[391] These were:[392]

> (1) whether the theory or technique can be and has been tested:
>
> [S]cientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed this methodology is what distinguishes science from other fields of human inquiry.
>
> (2) whether the theory or technique has been subjected to peer review and publication:
>
> [S]ubmission to the scrutiny of the scientific community is a component of "good science", in part because it increases the likelihood that substantive flaws in methodology will be detected.
>
> (3) the known or potential rate of error or the existence of standards; and
>
> (4) whether the theory or technique used has been generally accepted.

[492] The approach to the admissibility of novel scientific evidence was reviewed again by this Court in its subsequent decision in *Lundy v R*.[393] This Court considered that the *Daubert* considerations were intended to exclude not just "pseudo-science" but also scientific methodologies not yet validated by the relevant scientific community:

> [239] What then constitutes substantial help? We consider it is axiomatic that if the fact-finder is to be helped to ascertain facts, expert opinion evidence must meet a threshold of reliability. Otherwise the evidence will hinder, and potentially mislead rather than help. So the majority of this Court was clearly right when in the pre-trial appeal that identified that one purpose of what it called (with reference to *Daubert*) the "superadded admissibility requirements" is to protect the jury from "what is sometimes colloquially called pseudo-science, meaning idiosyncratic and plainly unsatisfactory theories". It contrasted this with the concept of "evidence from a reputable source which is robustly and carefully researched and analysed", and observed that the fact of disagreement among scientific experts about the degree of reliability of evidence would not be in itself a reason for withholding it from the jury, provided it is substantially helpful and not unfairly prejudicial.

---

390 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67, [2016] 2 NZLR 750 at [94], citing *Mahomed v R* [2010] NZCA 419 at [35]; and *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277 at [41].

391 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [138]–[139], citing *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993) at 593–594.

392 At [138].

393 *Lundy v R* [2018] NZCA 410. This point was not at issue on appeal to the Supreme Court: *Lundy v R* [2019] NZSC 152 at [48], n 65.

…

> [241] We consider the *Daubert* considerations are clearly intended to reject a wider category of evidence than idiosyncratic and plainly unsatisfactory theories. This is because in the scientific field whether a methodology is satisfactory or unsatisfactory must depend ultimately on the response that is given to it by the relevant scientific community. The robustness of the methodology cannot legitimately be established by an inexpert judge or jury. The essential work of validation must occur before the courtroom is entered. That is why the *Daubert* considerations require testing of the technique, peer review and publication, known or potential rate of error and whether the theory or technique has been generally accepted. …
>
> (footnote omitted)

[493] Mr Hodder argues that the nature of ICEs, including PacICE1, made the evidence insufficiently reliable as a piece of circumstantial evidence. He says Dr Poulter's conclusions are unsound because the methodology could not be proven, has a high potential error rate because of the characteristics of PacICE1 as a mobile genetic element that can be acquired either vertically or horizontally, is not generally accepted in the relevant scientific community as a reliable way of establishing evolutionary relationships, and would not be accepted for publication in peer reviewed publications within the field of evolutionary genetics. Further, PacICE1 is not specific to the Psa bacteria found on kiwifruit and, because of these characteristics, it is not routinely tested for. As a result, the true level of prevalence is unknown which must undermine Dr Poulter's view that it was extremely rare.

[494] The respondents do not accept that the Judge wrongly reached her conclusion on the basis of Dr Poulter's evidence as to the significance of PacICE1. Rather, they say her conclusion was based on the facts that:

(a) the DNA evidence conclusively established that the Psa3 outbreak had only one origin and all the Psa3 in New Zealand has reproduced clonally from that single point of origin, something that all the experts agreed on;

(b) PacICE1 was present in the M7 sample, in all early strains of Psa3 in New Zealand and in Psa3 strains in Korea and Japan that are generally accepted as having come with pollen imports from New Zealand; and

(c) the M7 sample was collected in close proximity to the location where the Chinese kiwifruit flowers were grown, gathered and milled to produce the June 2009 consignment.

[495] In our view the Judge's reliance on the presence of PacICE1 was an error. Before the Judge could place weight on it she had to be satisfied that she would be likely to obtain substantial help in determining the likely origin of the Psa3 strain from Dr Poulter's opinion that the presence of PacICE1 in both the New Zealand and M7 (Shaanxi) strains of Psa3 established an association between the M7 strain and the New Zealand incursion. That required the Judge to be satisfied that the PacICE1 evidence has "a sufficient foundation of reliability".[394]

[496] The genetic evidence as to source was uncontested only to the extent that the Psa3 outbreak had a single point of origin, which was China. But given the size of China, that fact could not, in itself, assist in determining whether Orchard 1 was the source of the Psa3 that entered New Zealand. The location from which the M7 sample was taken is of no significance without the PacICE1 evidence. The presence of PacICE1 in the New Zealand and Chinese samples was not a fact to which any significance could be attached without the assistance of expert evidence.

[497] However, there was insufficient evidence that Dr Poulter's theory would satisfy the *Daubert* criteria. His opinions had been published in a peer-reviewed article but that article provided only limited support for the theory, focusing more on the orthodox method of sequencing core genomes. The Crown's experts also disagreed with the conclusions regarding ICEs in that paper.

[498] Further, the potential rate of error is unknown[395] and the evidence before the Court strongly suggests that reliance on ICEs in phylogenetic analysis is not widely accepted in the scientific community. While disagreement among experts as

---

394 At [80].

395 Dr Poulter accepted in cross-examination that it cannot be known how many PacICE1 there were in China between 2006 to 2010 because of the lack of samples. Although this statement was made in the context of a challenge to Dr Poulter's claim that the presence of PacICE1 on both strains was "exquisitely rare", it can be inferred that an unknown prevalence of PacICE1 would lead to an unknown rate of error in respect of his hypothesis.

to reliability will not in itself be a reason to withhold evidence from the factfinder,[396] the failure of the respondents to establish that the PacICE1 evidence goes beyond "mere theory" means that it does not reach the s 25(1) threshold.

[499] Even if the evidence was adduced simply to prove that a particular ICE is found on both strains, our conclusion as to admissibility remains the same — the presence of an ICE without expert opinion as to its relevance to the broader issue of causation lacks probative value and would likely have an unfairly prejudicial effect. We therefore accept the Crown's submission that Dr Poulter's methodology was not sufficiently reliable to provide substantial assistance. We would have found the PacICE1 evidence inadmissible.

Reliance on MLVA evidence

[500] The Judge also took into account evidence about an analysis based on a method known as MLVA.[397] This method was developed as a fast, reliable method of analysing genetic diversity in genetically homogeneous species for use in outbreak situations. It is not as well suited to longer-term work directed at establishing the genetic lineage of an outbreak. Expert evidence from Dr Mazzaglia of analysis based on this method was advanced in support of Dr Poulter's WGS analysis, as a cross-check. It was not suggested that the evidence established the geographic origin of the first New Zealand strains. Rather, it indicated that the 2010 strains from Shaanxi were genetically closer to the New Zealand strain than strains from either Chile or Europe.

[501] The Judge accepted that the MLVA method had limitations compared to WGS and also that, as asserted by the Crown, the analysis suffered from geographical and temporal biases as a result of over-representation of Chinese and New Zealand samples and samples taken after 2010.[398] The Judge therefore accepted that

---

396 *Lundy v R*, above n 393, at [239].

397 Multilocus VNTR (variable number of tandem repeats) was explained in the High Court judgment, above n 2, at [1150]–[1151] as a method that analyses regions in the DNA (microsatellites) where a small number of base pairs are repeated multiple times in tandem (tandem repeats). During replication the double strand temporarily dissociates and can then mis-pair through expansion or contraction, resulting in insertion or deletions and a degenerated/imperfect tandem repeat. Strains can be distinguished based on the number of repeats present at a particular site.

398 At [1228] and [1230].

the analysis did not, in itself, establish the origin of the New Zealand Psa3 strain but she regarded it as another strand of evidence that could be taken into account.[399] We consider that, whilst MLVA is not as reliable as WGS, it was nevertheless a recognised scientific method sufficient to satisfy the heightened threshold under s 25. The Judge was therefore entitled to put some weight on it.

Conclusion on the genetic evidence

[502] We would have found that the Judge was entitled to rely on the WGS and MLVA evidence, but not on the PacICE1 evidence. That error does not, however, necessarily mean that the Judge's overall conclusion as to causation was wrong — that depends on the totality of the remaining evidence. We now turn to consider the specific findings regarding causation.

Orchard 1 as the source of the June 2009 consignment

[503] The Judge found that it was quite "possible and plausible" that the June 2009 consignment had come from Orchard 1 in Shaanxi.[400] As noted above, this finding was relevant to the findings regarding the genetic origin of the Psa3 strain found in New Zealand in 2010. The Crown's argument, based on a "links in the chain approach", that the evidence could not be taken into account fails as a result of our conclusion as to the correct approach to be taken to a circumstantial case. However we proceed on the basis of the Crown still not accepting that the pieces of evidence the Judge relied on were sufficiently reliable to be taken into account or did not support the conclusion drawn.

[504] Ms Hamlyn gave evidence that the anthers came from an orchard outside Xi'an, the capital of Shaanxi. The phytosanitary certificate referred to Shaanxi being the place of origin of the June 2009 consignment and Xi'an being the place of issue of the certificate. However, Ms Hamlyn had no personal knowledge of the orchard that supplied the anthers. The anthers were supplied pursuant to an arrangement between Kiwi Pollen, Bexley Inc (a United States corporation controlled by Mr Sarui who was

---

399 At [1230].
400 At [1253(h)].

based in Japan) and Mr Sarui's contact in China, Dr Qu.[401] Ms Hamlyn dealt with Mr Sarui. Neither Mr Sarui nor Dr Qu gave evidence.

[505] In 2009 Ms Hamlyn did not know where the anthers had come from. In 2012 she visited China. She explained:

> I visited Shaanxi and Sichuan provinces in the second part of 2012. By that time there was a question mark over whether Psa had come to New Zealand from China. I had never been to China before and, given the speculation about China's involvement in the New Zealand outbreak, I wanted to see our collaborative pollen production business.
>
> Kazu, Dr Qu and I were all together in Shaanxi and Sichuan. Dr Qu took us to see the three mills in different locations. One was in Sichuan and the other two were in Shaanxi. My best recollection is the anthers of the 2009 shipment came from one or two of these locations in Shaanxi. Dr Qu also took us around some orchards. One of the orchards in Shaanxi may have been the origin of some or all of the anthers.

[506] In cross-examination she could not recall who had told her about where the anthers came from:

> A. I don't recall the conversation exactly but my understanding was that it came from the, what we called the number 1 location which was the closest one to Xi'an.

[507] Ms Hamlyn was cross-examined on the location by reference to a map. It was evident that she had difficulty identifying the precise location but was able to say that "the nearest town to the orchard that I'm aware of is … called Zhouzhi".

[508] The Judge found:

> [1036] As a result of the trip she learned the shipment of anthers had come from Orchard 1. …
>
> [1037] Given the reason for Ms Hamlyn's trip to China it would be surprising if she had not wanted to know where the anthers had come from. At around this time she also put some pins on a [G]oogle map to show the locations of the three orchards they had been to, having discussed this with Mr Sarui. She did this because she wanted to know where she had been (all the signs were in Chinese and she had travelled a long way from Shanghai). This reinforces the likelihood that Ms Hamlyn was able to accurately recall that the anthers certainly came from Orchard 1, whether or not some also came from Orchard 2. I accept her evidence that some, probably all, of the anthers came from Orchard 1.

---

401 The intention was to enter into a formal agreement but the Psa incursion intervened.

[509] The challenge to the finding is based on the vagueness of the evidence rather than its admissibility; there is no reference to any objection to Ms Hamlyn's evidence of being told which orchard supplied the anthers (presumably because of the cost of bringing Dr Qu or Mr Sarui to New Zealand). The Crown says that Ms Hamlyn's evidence was too uncertain a basis for finding the source of the June 2009 consignment. However, we consider that the (hearsay) evidence as to the fact that all or part of the June 2009 consignment came from Orchard 1 coupled with Ms Hamlyn's evidence provided a sufficient basis for the Judge's finding as to where Orchard 1 was located.

[510] That said, our conclusion in relation to the inadmissible PacICE1 evidence means that this piece of evidence has little significance. It was relied on by the respondents to link the source of the June 2009 consignment with the M7 sample thereby bolstering the claim that the June 2009 consignment was infected with the Psa3 strain. But since the connection between the M7 sample and the New Zealand strain of Psa depends on the PacICE1 evidence, whether the June 2009 consignment came from Orchard 1 or not had could not assist in determining whether the June 2009 consignment was infected.

The epicentre of the Psa3 outbreak

[511] The two orchards that the Judge found to have been at the epicentre of the incursion were Olympos, situated across the road from one another on Mark Rd. These were the first two orchards in Te Puke to report symptoms of Psa3 and were identified by MAF as RP1 and RP2 respectively.[402] Kairanga was owned and managed by Mr Crawshaw and Ms Hamlyn. Kairanga was planted entirely with the Hort16A organic variety and had used artificial pollination in 2009 and 2010.

[512] The epidemiology of Psa3 was an important factor in the Judge's finding.[403] Briefly, Psa3 reproduces clonally and can expand from one cell to millions in a matter of hours. It infects kiwifruit plants by entering through openings in the plant tissue. Psa3 can survive on the surface of a plant and multiply without harming the plant or

---

402 RP stands for "Restricted Place".

403 High Court judgment, above n 2, at [997]–[998].

showing any symptoms other than leaf spotting and the pathogen can also infect a plant but remain latent or dormant without producing any visible signs of infection. Symptoms will develop once a critical population is reached and conducive environmental conditions exist. Psa3 can spread within and across orchards through both human and natural pathways. It can be carried by wind, rain, insects, birds and bees. It can also be transferred by artificial pollination or be carried on contaminated tools, equipment, vehicles and footwear.

[513] The Judge's finding of Olympos and Kairanga orchards as the epicentre was based on the evidence about the symptoms noticed at those orchards. At Olympos dieback of male vines was noticed in April 2010 and then, following artificial pollination by Kiwi Pollen, leaf spotting was noticed in late October 2010. Following testing by MAF, Psa3 was confirmed at Olympos on 5 November 2010.

[514] Sick looking vines were noticed at Kairanga in early October 2010 and Psa3 confirmed by MAF on 8 November 2010. The Judge accepted that it was not possible to be sure which of Olympos or Kairanga was infected first.[404] The Judge's finding as to the epicentre being at one or other of these two orchards was based on:[405]

(a) MAF's Psa Pathway Report completed in late 2011;

(b) a report undertaken in 2017 by the then Ministry of Primary Industries (MPI) from expert epidemiological evidence by Dr Beckett on behalf of the respondents;[406] and

(c) maps produced by an economist, Mr Colegrave, showing the spread of Psa3 across Te Puke orchards.

[515] By reference to maps prepared showing the location of Psa infections between early 2011 and late 2012, Dr Beckett concluded that the Psa3 outbreak was initially confined to a small part of Te Puke but subsequently spread aggressively among

---

404 At [1018].
405 At [1020]–[1026].
406 Rob Taylor, Ruth Griffin and Brett Alexander *Strain characterisation of Psa isolates collected from kiwifruit orchards during the initial outbreak in the Bay of Plenty* (Ministry for Primary Industries, 28 April 2017).

neighbouring orchards and then to other areas in Te Puke through spot outbreaks and then to other regions in the Bay of Plenty. Mr Colegrave's dynamic maps showed the spread of Psa3 radiating out from the Olympos and Kairanga orchards.

[516] The first basis on which the Crown challenges the finding that Olympos or Kairanga was likely the epicentre concerns the evidence that Psa3 symptoms were identified at an orchard (named Hungerford) some three kilometres from Kairanga and Olympos. Shane Max, a Zespri manager involved in the investigation, commented that MPI had tried to find a link between Olympos/Kairanga and Hungerford but was unable to do so. The Crown also relied on two other orchards with significant symptoms at an early stage which were some kilometres from Olympos and Kairanga. The Judge acknowledged the evidence about these orchards but did not regard it as inconsistent with the general pattern of the data showing Olympos and Kairanga as the epicentre.[407] Given the ease with which Psa3 could spread, the distance could be explicable by natural and/or human causes. The Crown argues that the Judge's approach was not supported by any evidence as to directionality to establish the spread.

[517] We accept the submissions on behalf of the respondents on this point. The evidence regarding the three other orchards is not persuasive. No evidence was led from the operators of those orchards. The evidence relating to two of them was equivocal and it was evident that MAF itself regarded Olympos and Kairanga as the initial site of infection.

[518] The second basis on which the Crown challenges the Judge's finding was that the dynamic maps adduced by Mr Colegrave do not in fact show an epicentre and infection radiating out. The respondents refute this submission, saying that this argument is contradicted by MAF itself in statements published in its 2017 report that "[t]he bulk of the positive orchards are clustered together and appear to radiate out from [Olympos] and [Kairanga]".[408]

---

407 High Court judgment, above n 2, at [1028].
408 Taylor, Griffin and Alexander, above n 406, at 1.

[519] In our view there was sufficient evidence from which the Judge was entitled to conclude the epicentre was likely in the location of Olympos and Kairanga.

Means of infection

[520] Finally, the Crown challenges the uncertainty as to the means by which the Kairanga and Olympos orchards became infected. Although the respondents' case concerned a number of orchards, the focus of this aspect of the causation issue was on whether and how Psa3 reached Kairanga and Olympos orchards and infected the vines.

[521] At trial the respondents' case was that there were multiple opportunities for the June 2009 consignment to infect the orchards and that this fact constituted a strand of circumstantial evidence from which, together with the other evidence, the Judge might infer causation. The respondents advanced eight possible pathways of infection but did not identify any one of them as, more likely than not, the cause of infection:[409]

(a) pollen was applied to Olympos in or after spring 2009 as part of Kiwi Pollen's experiments;

(b) pollen was bulked up with other pollen and applied to Olympos in spring 2010;

(c) pollen contaminated other pollen that was used to pollinate Olympos in spring 2010;

(d) pollen was used on Kairanga as part of Kiwi Pollen's experiments;

(e) pollen was bulked up with other pollen and applied to Kairanga in spring 2009 or spring 2010;

(f) pollen contaminated other pollen that was applied to Kairanga in or after spring 2009 or spring 2010;

---

409 High Court judgment, above n 2, at [1083].

(g) the anther debris contaminated equipment that was used on Olympos or Kairanga; and/or

(h) pollen or anther debris otherwise contaminated Olympos or Kairanga.

[522] The Judge approached this issue by asking herself whether the respondents had established that there was a myriad of ways for the pollen, if the pollen or anther waste contained Psa3, to have reached those orchards and infected the vines.[410] She concluded:[411]

> There is a myriad of possible ways for Psa3 to have infected [Olympos] or [Kairanga] in spring 2009 and 2010. Some of those ways seem more plausible than others. But none can be entirely discounted. Psa3 is a robust bacteria that survives in plant material and can be spread in multiple ways. I do not accept the defendant's submission that the law requires one of the identified possible pathways to be proven to the balance of probabilities. I do accept the plaintiffs' submission that it is not necessary to find any one of these ways as the likely pathway for infection. The fact that there are multiple possible ways is itself a strand of circumstantial evidence, which can be added to the other strands of the cable supporting the plaintiffs' inference of causation.
>
> …
>
> If Psa3 was in the consignment there are multiple pathways by which it could have infected Kairanga and Olympos orchards. It is not possible to say which of those pathways occurred or to be absolutely certain that any of them did from the evidence about what occurred. However the range of possible pathways are consistent with the symptoms that were discovered at those orchards in October and November 2010. These pathways range from exposure by one or both of those orchards to a small level of Psa3 in spring 2009 to exposure to a high level of Psa3 in early October 2010. Some of these pathways are less likely than others especially if Ms Campbell's and Mr Crawshaw's recollections about when they noticed the damaged the vines in spring 2010 is correct (that is, before artificial pollination on Kairanga) and if all the cannisters used to pollinate Olympos in spring 2010 were tested comprehensively and reliable. Nevertheless, even if those pathways were excluded, there remain multiple pathways by which Olympos and Kairanga could have been infected by Psa3 from the anthers or the pollen obtained from those anthers.

[523] The Crown says the Judge erred in her approach and that it was incumbent on the respondents to establish one means of infection that was more likely than not and for the Judge to make a finding to that effect.

---

410 At [1084].
411 At [1114] and [1253(f)].

[524] We do not accept that the Judge was required to do that. As already discussed, the Judge was not required to make a finding on each piece of circumstantial evidence on a "link in the chain" basis but simply to look at the totality of the evidence and decide whether the respondents had met the burden of proof to the requisite standard. The task confronting the Judge was to determine whether the totality of the evidence showed, on the balance of probabilities, that the Crown's negligence led to the orchards becoming infected with Psa3. This is a finding that may be made on the basis of inference, from circumstantial evidence, as explained in *Seltsam* — that although the existence of a causal relationship must be found on the balance of probabilities, that finding may be reached by inference from several pieces of evidence, none of which show more than a possibility.[412]

[525] As to what it means to be possible, Spigelman CJ adopted the formulation of words used by Kitto J in *Jones v Dunkel* as whether the pieces of evidence "positively suggest" the causal link sought to be inferred from that and other strands of circumstantial evidence.[413] A positive suggestion requires an evidential foundation. So a theory that has no evidential foundation to demonstrate its feasibility could not form a strand of circumstantial evidence. This involves an assessment of the evidence, including challenges to the feasibility of the theory.

[526] The possible pathways for infection identified by the Judge above centred around:

(a) experimental artificial pollination at Olympos in spring 2009;

(b) actual artificial pollination at Olympos in 2009 or 2010;

(c) experimental or actual artificial pollination at Kairanga in spring 2009 or spring 2010; and/or

(d) infection from either unintentional transfer of anther waste or transfer by the elements.

---

412 *Seltsam Pty Ltd v McGuiness*, above n 376, at [98].
413 At [97] and [100], citing *Jones v Dunkel* (1959) 101 CLR 298 at 305.

[527] The Judge assessed the evidential foundation for each pathway. This was the correct approach. She formed differing views as the level of possibility of each. For example, she considered that "there is a reasonable basis in the evidence to support the first possibility".[414] Other possibilities she found to be less likely: "possible but not likely",[415] and "possible but not likely… [though] not a possibility that can be discounted altogether".[416]

[528] Essentially the Crown's challenge is that the various pathways suggested by the respondents as to the means of infection do not reach a sufficient level of possibility but rather are all "speculative, theoretical possibilities which are unsupported on the evidence". Three reasons are advanced in support of this submission. First, the evidence about the "time to symptom" does not support the inference that Psa3 was spread through artificial pollination. Secondly, the susceptibility of the Hort16A variety to Psa3 makes it highly unlikely that it was introduced through artificial pollination in 2009 but went unnoticed until 2010. And thirdly, to the extent the respondents say that the pathogen was spread by contaminated equipment, expert evidence indicates that it is highly unlikely that the pathogen would have survived the winter.

[529] The respondents do not accept these criticisms. They say that the Judge was correct to find that all the pathways were possible and that this finding was available on the evidence. We therefore consider the evidential foundation for the respective pathways and the criticisms levelled by the Crown.

Time to symptom evidence

[530] The first issue primarily addresses the proposition that infection was caused through artificial pollination in October 2010. It relates to the evidence of the expected lag between exposure to Psa3 and symptoms, which the Crown says does not support this possible means of infection.

---

414 High Court judgment, above n 2, at [1094], in reference to the possibility of pollen being applied to Olympos through pollination experiments after spring 2009.

415 At [1098], in reference to the possibility of pollen being bulked up with other pollen and applied to Olympos in spring 2010.

416 At [1101], in relation to other pollen being contaminated by the Psa3 extracted from the anthers and used on Olympos in spring 2010.

[531] Dr Vanneste gave evidence that the time between exposure and symptoms would likely be between one week (in optimal glass house conditions) and a few months.[417] But Dr Vanneste considered that in orchard conditions in the New Zealand climate, one would not expect symptoms earlier than a few weeks after pollination. He had, for example, observed orchards in Te Puke progress from asymptomatic in November/December 2010 to secondary symptoms by March/April 2011, a period of three to five months. The respondents' experts considered that, if kiwifruit plants were infected with Psa3 by pollen, it would likely take between several weeks to one year before infected plants showed first symptoms. The Judge preferred the opinion of the respondents' experts, finding that between a few weeks to one year delay could expected between exposure and symptoms. On that basis she held that the time to symptoms was consistent with each of the pathways proposed by the respondents as a possible means of infection.[418]

[532] Symptoms that may have been Psa3 (although were discounted as wind damage at the time) were first observed at Kairanga on 3 October 2010. Psa3 was confirmed within four to five weeks after that. Artificial pollination was found to have occurred there on or about 7 October 2010. On the Crown's argument artificial pollination could not have been the cause of the symptoms, because those symptoms appeared before the artificial pollination was undertaken. The Crown also says that the symptoms did not appear to follow the path of the artificial pollination.

[533] The Judge did not address the latter point. She did not accept the timing argument because she considered that the evidence about timing (presumably both the artificial pollination and the appearance of the symptoms) was "not precise".[419] In our view, even allowing for the imprecision of the evidence, the weight of the evidence was that symptoms pre-dated the 2010 artificial pollination. There was, therefore, no evidential basis on which to conclude that infection at Kairanga was possibly caused by artificial pollination in 2010.

---

417 Specifically, Dr Vanneste described the conditions necessary for the expression of symptoms within one week as "in the greenhouse, under optimal conditions … using [a] very high level of inoculum".

418 High Court judgment, above n 2, at [1134].

419 At [1134].

[534] In respect of Olympos, symptoms were observed on 21 October 2010. Artificial pollination took place there on 13 and 16 October 2010. The Crown says that, with reference to the expert evidence, this period was too short for infection to have been caused by the artificial pollination. The Judge considered that the time to symptoms was consistent with each infection theory, including at Olympos, but regarded it as "possible but not likely" that the infection was caused by artificial pollination primarily because the cannisters used had tested negative for Psa3. In our view the evidence about the time between exposure and symptoms (including as found by the Judge) did not support a conclusion that infection at Olympos could have been caused by artificial pollination activities in 2010.

[535] The result is that infection pathways at Kairanga and Olympos involving artificial pollination in 2010 were not possible means of infection that the Judge could take into account as a piece of circumstantial evidence. This removes the respondents' possibilities (b) and (c) and, to the extent they relate to 2010, (e) and (f). There is no basis to find infection could have been caused by artificial pollination in 2010.

Susceptibility of Hort16A variety

[536] The second issue relates to the proposition that infection was caused by artificial pollination in spring 2009 (undertaken either experimentally or commercially). In addition to the above, the Crown says that the particular susceptibility of the Hort16A variety to Psa3 means that exposure would have led to symptoms within a few weeks to a year. This is inconsistent with any theory that relies on artificial pollination occurring in spring 2009 but the symptoms not expressed or noticed until October the following year.[420]

[537] This aspect requires consideration of the latency period that has been observed in Psa3 and its effect on the Hort16A variety. Psa bacteria has both an epiphytic stage (being the time between exposure and infection) and an endophytic, or latent, period (being the time between infection and the expression of symptoms). At the epiphytic stage, the bacteria can survive on the plant without actually infecting it and infection

[420] The dates on which artificial pollination was undertaken in 2009 are unknown but it is reasonable to assume that it would have been done at a similar time ie late September or early October during flowering.

might depend on the rate at which the bacteria colonise the plant. Other variables such as temperature and the environment also have a considerable effect on the spread of the disease.[421]

[538] As noted above, the Judge found that it could have been between a few weeks and up to a year from exposure to Psa3 to symptoms.[422] This conclusion rested heavily on a paper which reported on the Hayward variety in Italy.[423] However, it is uncontested that there is a considerable range of factors that influence the time between vine exposure to Psa and the expression of symptoms. The experts agreed that the symptoms of Psa3 appeared more quickly and noticeably on Hort16A (which both Olympos and Kairanga were planted with) than the Hayward variety following infection.

[539] Although the Judge referred to the susceptibility of Hort16A to Psa3, she appeared not to take that into account in assessing the probable latency period.

[540] In our view, the particular susceptibility of the Hort16A variety meant that the Tontou paper should have carried less weight than given by the Judge. Noting the experts' agreed opinion that symptoms would be noticeable soon after infection, we agree with the Crown that the weight of the evidence does not support a conclusion that spring 2009 pollination activities provided a possible means of infection in this case. This does not however rule out infection through other means (for example, contaminated equipment). But the possibility of infection through other means depends on Psa3 being able to survive for several months to a year before actually infecting plants.

---

421 Dr Balestra and Dr Beckett considered that if kiwifruit plants were exposed to Psa3 by pollen, it could take anywhere between several weeks and one year before infected plants show first symptoms of the disease. Dr Vanneste did not agree with that view (or the paper on which it was based). He thought that the latency period was likely to have been between a few weeks and a few months depending on the time of year. He did not think the latency period could have been as long as a year, though he conceded in cross-examination that the number of variables made it difficult to be definitive.

422 High Court judgment, above n 2, at [1134].

423 Rodanthi Tontou, Davide Giovanardi and Emilio Stefani "Pollen as a possible pathway for the dissemination of *Pseudomonas syringae* pv. *actinidiae* and bacterial canker of kiwifruit" (2014) 53 Phytopathologia Mediterranea [Tontou paper] at 333.

Survivability of Psa3

[541] The third challenge to the Judge's treatment of this evidence was in relation to the survivability of Psa3 bacteria prior to infection. Given that the June 2009 consignment arrived mid-winter, any transfer of Psa3 by way of contaminated equipment or vehicles would have required the Psa3 to survive between the processing of the anthers and spring 2009. The Crown says that this would not have happened because of the fragility of the Psa3 bacteria. This submission relied on evidence from Dr Vanneste that, to multiply, Psa3 requires a carbon source, a nitrogen source and water, none of which could be found on non-living surfaces such as metal or plastic. However, the Judge specifically referred to this evidence and, whilst not rejecting it, also took into account other of Dr Vanneste's evidence that Psa could survive in pollen through heat (depending on the concentration) and his opinion that Psa stored in unfrozen pollen would be unlikely to survive for "longer than a couple of months" and Psa bacteria in a consistent frozen state could survive in a dormant state "for a number of years".[424] The Judge also took into account other evidence, from Dr Balestra and Dr Mazzaglia, to the effect that Psa "overwinters readily in leaf litter and pruning debris, representing a potential inoculum source for infection of new spring growth".[425]

[542] This evidence was relevant alongside the fact that, although there was no reliable evidence about what had happened to the anther waste after being cycloned, it seemed unlikely that organic waste was kept at the Main Rd premises where the anthers would have been processed. In past years organic waste for composting had been dumped down the bank at the Kairanga orchard. Sometimes waste was sent by truck to a composting facility at Paengaroa. The Judge concluded:[426]

> The best that can be said is that Ms Hamlyn might have put the anthers waste in the bin, but it is also possible it ended up somewhere else. It is clear that Kiwi Pollen had disposed of some milling waste by allowing it to return to the ground from time to time at least. It was not a large quantity and "bits of flowers" would not look amiss on the site…

---

424 High Court judgment, above n 2, at [1073] and [1075].
425 At [1079].
426 At [1068].

[543] In these circumstances the Judge found that it was probable that the Psa3 would survive in the pollen, frozen or unfrozen, and also probable it would survive in the anther debris, at least for a few days, if that debris was put somewhere on the ground outside the pollen room or otherwise.[427] Particularly given the fact that Mr Crawshaw from Kiwi Pollen worked at both the Main Rd premises and experimented at Kairanga and Olympos, the Judge was entitled to find that Psa3 could have survived long enough to be transferred on equipment or with leaf debris on a vehicle.

Conclusion on infection pathways

[544] The time to symptom evidence and characteristics of the Hort16A variety directly conflicts with the Judge's findings as to likely time to symptoms, which renders any theory involving artificial pollination in spring 2009 or 2010 unsupported on the evidence. This means that infection pathways (b), (c), (e) and (f) are speculative and not supported by the evidence. But the respondents' argument was simply that there were multiple possible infection pathways from the Kiwi Pollen premises where the anthers were milled to either Kairanga or Olympos orchards, where the first symptoms were detected.

[545] The following pathways, which do have evidential support (although limited), remain:

> (a) pollen was applied to Olympos … *after* spring 2009 as part of Kiwi Pollen's experiments;
>
> …
>
> (d) pollen was used on Kairanga as part of Kiwi Pollen's experiments;
>
> …

[427] At [1081].

(g) the anther debris contaminated equipment that was used on Olympos or Kairanga; and/or

(h) pollen or anther debris otherwise contaminated Olympos or Kairanga.

[546] We consider that each of these possible pathways offered a means of infection that reached the threshold described in *Seltsam* so that the Judge could take them into account, along with all the other pieces of circumstantial evidence in reaching a conclusion on causation.

Conclusion on causation

[547] We would have agreed with the Judge's overall finding that the June 2009 consignment was, more likely than not, the source of the Psa3 incursion:

(a) The Judge correctly approached the issue of causation on the basis that the burden lay with the respondents.

(b) The Judge's orthodox "strands in a cable" approach to the assessment of circumstantial evidence was correct.

(c) The Judge erred in placing weight on the PacICE1 evidence, but was nevertheless entitled to find that Olympos and Kairanga orchards were the epicentre of the incursion, the epicentre of the incursion was associated with the importers of pollen, there were viable means by which that pollen could have reached the orchards in 2009 and survived long enough to infect vines the following year, and the absence of any other apparent association that could explain the epicentre heightens the coincidence.

(d) Finally, although the infection through commercial artificial pollination at Kairanga and Olympos is not supported by the evidence and therefore inadmissible as a strand of epidemiological circumstantial evidence, the remaining infection pathways were possible on the evidence and open to the Judge to consider.

ISSUE 6: RESPONDENTS' CROSS-APPEALS ON DUTY OF CARE

Issue 6(a): Did the High Court err in finding that those within the Strathboss class would have to show they had property rights in the vines and crops, or that their interest in the vines and crops was sufficiently direct or closely associated with those rights that they should be treated as though they have suffered loss to their property?

[548] The group (the Strathboss class) who were represented by the first respondent comprised five broad categories:[428]

(a) owners and operators;

(b) owners and lessors;

(c) operators and lessees;

(d) growers who sold their orchards after testing positive for Psa3; and

(e) growers who sold their orchards before testing positive for Psa3.

[549] Seeka qualified as a member of the Strathboss class in its capacity as a grower operating a number of kiwifruit orchards under long and short term leases and the owner of two orchards. However it also appeared as second respondent in respect of its claim in its role as a PHO.

[550] As earlier noted the approximately 3,200 registered kiwifruit orchards range from small lifestyle blocks to large commercial operations, some being owner operated while others are leased.[429] Ownership is by individuals or through companies, trusts, partnerships and Māori land trusts.[430]

[551] The Judge left for a later stage of the case the determination of who in the Strathboss class falls within the group to whom the duty found is owed, explaining:[431]

---

428 At [221(b)].
429 See above at [13].
430 High Court judgment, above n 2, at [44]
431 At [28].

> Those within the Strathboss class will have to show they had property rights in the vines and crops or that their interest in the vines and crops is sufficiently direct or closely associated with those rights that they should be treated as though they have suffered loss to their property.

[552] In its cross-appeal the first respondent challenged the above finding, contending that MAF personnel owed duties to all the five categories of claimant above. For three reasons we do not propose to explore this issue.

[553] First, we do not have the benefit of the Judge's consideration of the issue. As she explained:

> [435] I have not attempted to identify who within group 1 in the Strathboss class (owners and operators) will have "property rights" in the kiwifruit vines and their crops. Based on the submissions on Seeka's leases this is not straightforward. More importantly I have not seen all the leases of those in the Strathboss class. This issue is not directly raised by the questions for this stage. It is better left for consideration when all the information is available and a full focus can be put on the issue.

[554] That leads to the second reason which is that we did not receive comprehensive submissions on this particular issue. Indeed the first respondent's submissions focus on the plight of growers who suffered economic losses when they sold their orchards at substantially reduced values after the Psa3 outbreak but before their own orchards were infected. This prompted the Crown to observe that the cross-appeal had been narrowed.[432]

[555] Thirdly, the fate of the appeal has already been determined by our findings on immunity and on duty. Those conclusions are likewise determinative of the first respondent's cross-appeal. In those circumstances we do not consider it necessary or desirable to prolong this judgment with an exegesis on relational economic loss.

[556] Consequently while, for the reasons noted in our discussion of policy, namely the particular structure of the kiwifruit industry,[433] we recognise the merit in the argument that a somewhat arbitrary line was drawn among those to whom

---

[432] The Crown submits that the issue should be framed as: "Did the High Court err in finding that MAF personnel did not owe a duty of care to growers who suffered economic losses when they sold their orchards at reduced values after the Psa 3 outbreak but before their orchards were infected with Psa?"

[433] See above at [254]–[256].

the alleged duty was owed, for the above reasons we choose not to entertain the first respondent's cross-appeal.

Issue 6(b): Did the High Court err in finding that MAF personnel did not owe a duty of care to Seeka, in its capacity as a PHO, to take reasonable skill and care in their actions or omissions prior to the New Zealand Psa3 incursion to avoid economic loss to Seeka?

[557] Seeka, as second respondent, also cross-appeals against the Judge's ruling that it was not owed a duty of care. The Judge gave the following reasons for that finding:

> [498] I have reached a different view in relation to Seeka's claim as a post-harvest operator. It has suffered loss because of its business relationships with growers. That is relational economic loss. It is different in kind to property damage and more removed from the immediate consequences of the alleged negligence in this case. This means that the connection between Seeka and MAF is less close. Seeka's losses are not of a kind that are sufficiently distinct from others who suffered economic losses in some way because orchard production was affected by Psa. There are also issues about whether it is more appropriate that Seeka bear losses arising from adverse events in kiwifruit production whatever their cause than the government and ultimately the New Zealand public. Therefore I have not been persuaded that it is just, fair and reasonable for MAF to owe a duty of care to Seeka as a post-harvest operator.

[558] Primarily for the third reason above we choose not to entertain this cross-appeal. Furthermore we suspect that there may be advantage in this cross-appeal also being determined with the benefit of the further factual material which the High Court considered was required in order to resolve the first respondent's cross-appeal.

RESULT

[559] The appeal is allowed.

[560] The cross-appeals are dismissed.

[561] The respondents must pay the appellant costs for a complex appeal on a band B basis together with usual disbursements. We certify for second counsel.

[562] Costs in the High Court are to be determined by that Court.

Solicitors:
Crown Law Office, Wellington for Appellant
Lee Salmon Long, Auckland for Respondents